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Notes

The Need for a GATT Doctrine of *Locus Standi*: Why the United States Cannot Stand the European Community's Banana Import Regime

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On July 1, 1993, the European Community ("EC") restructured its import system for bananas by passing Regulation EEC No. 404/93 ("EEC 404/93").¹ Premised on Protocol 5 of the Lome Agreement of 1989,² EEC 404/93 grants preferential treatment to bananas entering the EC from a coalition of its African, Caribbean, and Pacific ("ACP") former colonies while discriminating against bananas originating in non-ACP countries (third country bananas).³ Various countries⁴ have challenged the validity

1. Council Regulation 404/93 of 13 February 1993 on the Common Organization of the Market in Bananas, 1993 O.J. (L 47) 1. The EC Council continues to amend EEC 404/93 aggressively based on circumstances it considers may adversely affect the beneficiary countries from the African-Caribbean-Pacific ("ACP") coalition. See, e.g., Commission Regulation 2358/95, 1995 O.J. (L 241) 5 (amending EEC 404/93 by allocating an additional quantity of imports to the established banana tariff quota during the fourth quarter of 1995 as a result of three tropical storms).

2. African, Caribbean and Pacific States-European Economic Community: Final Act, Minutes and Fourth ACP-EEC Convention of Lome, December 15, 1989, 29 I.L.M. 783 [hereinafter 1989 Lome Convention]. Under Protocol 5 of this agreement, known as the "banana protocol," the EC and its former colonies belonging to the ACP coalition agreed to "determine the measures to be implemented so as to improve the conditions for the production and marketing of bananas . . . [T]o enable the ACP states . . . to become more competitive both on their traditional markets and on the markets of the Community." *Id.* at 897. Through the 1989 Lome Agreement, and its three predecessors, the EC secured an institutional framework for the development of EEC 404/93 as member states voiced their support for a proposed joint coalition with a view towards achieving the objectives of the banana protocol. *Id.* at 898.

3. 404/93, *supra* note 1, arts. 1, 15, 18.

4. See First Submission of the United States of America in *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, 1996 WL 397092 (G.A.T.T.), ¶¶ 7, 11 (July 9, 1996) [hereinafter Brief for the U.S.]. The Regulation has affected several Latin American banana-producing

of this "discriminatory" import regime on different institutional grounds, including violations of the General Agreement on Tariffs and Trade ("GATT")⁵ and infringement of EC member states' sovereignty.⁶ In 1993, and again in 1994, several Latin American countries claimed disruption of market and competitive relationships before a GATT panel, specifically arguing that EEC 404/93 ran afoul of GATT Articles I, II, III, XI, and XIII.⁷ In 1994, Germany attacked the legality of EEC 404/93 on a different institutional front, under the Treaty on the European Community.⁸ Despite these efforts to dismantle or modify the EC banana regime, and in defiance of overwhelming criticism by economists and trade specialists,⁹ the EC's import mechanism survived.

nations (i.e. Colombia, Ecuador, Venezuela, Costa Rica, Guatemala, Honduras, Mexico, Panama, and Nicaragua) that have traditionally relied on the EC as their primary export recipient. *Id.*

5. See generally Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS, GATT Sales No. 1994-4 (1994), at 2 [hereinafter GATT]. The results of the Uruguay Round of negotiations included the creation of the World Trade Organization (WTO), the signing of the General Agreement on Tariffs and Trade 1994 (GATT 1994), and several other plurilateral agreements. GATT 1994 incorporates the original GATT 1947 giving it full effect in consideration of side agreements that limit or expand its original language.

6. See Case C-280/93, Federal Republic of Germany v. Council, E.C.R. I-4973, [1994] 34 I.L.M. 154 (1995) [hereinafter Germany v. EU Council]; see also Inger Österdahl, *Bananas and Other Current Issues in the External Trade Law of the European Union*, 6 MINN. J. GLOBAL TRADE 473 (1997) (stating Germany's claim against the EU Commission for acting in contravention of its authority vested through the Treaty on the European Community).

7. GATT Dispute Settlement Panel Report on the European Economic Community - Import Regime for Bananas, Jan. 18, 1994, 34 I.L.M. 177, 185 (1995) [hereinafter 1994 Panel Report]. For a detailed discussion of Articles I, II, III, XI, and XIII, see *infra* notes 78-79, 108. See also *infra* note 49 and accompanying text.

8. See Germany v. EU Council, *supra* note 6, at 160-61.

9. See *Banana Policy Gone Mad*, J. COM., Aug. 7, 1996, at 7A (reiterating that the current import scheme represents an ill-advised financial arrangement for the European Union as it "costs European consumers about \$2 billion a year [but shows] hardly any increase in the consumer prices reaching the banana-exporting nations for whom it is intended"). Cf. *Banana Economies*, J. COM., Sept. 11, 1996, at 6A (ascertaining that the EU's policy only benefits the Caribbean Banana Exporters' Association as they retain the heavy premium European consumers pay while the growers for whom the policy was intended do not reap the same benefits). "The WTO should simply throw out the policy for violation of Economics 101." *Id.*

Staunch supporters of the regime, namely the United Kingdom, France, Spain, and the beneficiary ACP nations,¹⁰ however, currently face perhaps the most daunting legal challenge against this protectionist device. As the world's most influential trade player, the United States has assumed the position of lead claimant in constructing a joint legal attack with co-claimants Ecuador, Honduras, Guatemala, and Mexico.¹¹ Ironically, the United States is not a substantial banana-producing nation and yet it *stands* in the middle of this dispute demanding the EC comply with its obligations under several sections of the GATT and other Uruguay Round agreements.¹² The United States argues that American banana marketing firms have suffered particular injuries as a result of the EC banana import regime because they are unable to obtain the market share they enjoyed prior to the regime.¹³

Although the GATT currently does not recognize any principled doctrine of standing, it should adopt such a doctrine to enable it to determine which parties have an appropriate *stake* or *interest* in a dispute to properly seek relief under GATT. This Note examines established principles of *locus standi* from which a practical and appropriate doctrine of standing may be developed for the benefit of WTO dispute settlement administration. Taking the ongoing banana claim as the operating model, part I of this Note utilizes the antecedents to the current dispute to trace the path of the claimants' particular motivations, claims and separable legal arguments. Part II focuses on the main GATT dispute settlement provisions, Article XXIII and the DSU,¹⁴ which provide parties with the framework to bring their claims before the WTO and to ascertain their rights and obligations.

10. See Brief for the U.S., *supra* note 4, ¶¶ 15-17 (contrasting the treatment EC member states respectively afforded banana imports prior to EEC 404/93, which underscored the tendency of France, Spain and the United Kingdom to impose tariffs and non-tariff measures individually on Latin American bananas to allow domestic and ACP bananas to more amply serve the demand of their markets).

11. *Agriculture: EU Commission Approves New Rules on Banana Quota*, *Geographical Names*, 13 Int'l Trade Rep. (BNA), No. 36, at 449 (Mar. 13, 1996).

12. See discussion *infra* Part I.E.1.

13. See discussion *infra* Part I.D.

14. See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS, GATT Sales No. 1994-4 (1994) [hereinafter DSU].

Part III examines the concept of standing as a universal tenet in the administration of dispute settlement. This section includes an overview of the American¹⁵ and international doctrines of standing. This overview will enable the reader to discern the underlying motivations for such a doctrine in adjudicatory schemes and forecast the potential pitfalls the WTO faces in continuing to settle disputes without such a doctrine. Part IV applies the above-stated standing models to the American presence in the *Banana Case* in order to scrutinize its legal propriety. This section will examine whether under American and/or international principles of standing as articulated by the International Court of Justice in the *Barcelona Traction* case¹⁶ the United States or any state should be able to invoke a right to assert the interests of its nationals under diplomatic protection in these particular circumstances.

Finally, Part V synthesizes the principles used in both the American and international models of standing that should fuel the development of a viable and flexible GATT doctrine of standing. This Note concludes that if GATT adopted a standing doctrine, the United States would lack standing to assert its claim for relief in the *Banana Case* because it lacks the necessary *stake or interest* in the controversy. Such a conclusion would comport with established principles of standing in conjunction with the political and economic premises on which GATT was founded.

I. BACKGROUND

A. THE EC MARKET PRIOR TO EEC 404/93

Since 1988, the EC has boasted the title of "world's largest importer of bananas," credited with nearly 40% of the global banana market.¹⁷ In 1991, the cumulative volume of fresh bananas in the EC neared 3.63 million tons, of which Latin American countries produced two-thirds of the total.¹⁸ In 1992,

15. American jurists have fashioned perhaps the most principled, and well-documented, doctrine of standing of any legal system. Its application to the facts of this case serves only to illuminate the potential virtues and vices that may derive from such a doctrine in the GATT dispute settlement system.

16. See discussion *infra* Part III.A-B.; *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3 (Judgment of Feb. 5) [hereinafter *Barcelona Traction*].

17. 1994 Panel Report, *supra* note 7, at 183.

18. *Id.* Besides the 3.63 million tons the EC imported, the United States and Japan enjoyed the other considerable import markets of 2.9 million and 0.8 million tons respectively. *Id.*

the total supply of bananas in the EC market approximated 3.76 million tons of bananas, of which Latin American countries provided 2.4 million tons and ACP countries provided around 0.69 million tons.¹⁹

Before allowing entry of this large volume of bananas, however, customs personnel of individual EC member states subjected such bananas to their import regulations. Despite a GATT tariff commitment of 20% ad valorem,²⁰ EC member states differed in their regulation of banana imports.²¹ At one extreme, France, Spain and the United Kingdom (UK) subjected Latin American bananas to substantial tariff and non-tariff barriers primarily to permit ACP and domestic bananas to meet their market demand.²² On the other end, "Germany [alone] granted duty-free treatment for imports of bananas within a tariff-rate quota established at the level of estimated consumption, resulting in free entry for bananas from all sources."²³ Two other groups composed the middle ground of the EC's spectrum of banana import regulation. Italy, Greece and Portugal employed some non-tariff barriers, yet still permitted significant

19. *Id.* In 1992, EC domestic suppliers accounted for 19% of the bananas consumed in the Community, while ACP countries supplied 16%, and Latin American or other third country sources provided 65% of the total supply. Prior to EEC 404/93, the primary Latin American suppliers to the EC were Ecuador, Colombia, Costa Rica, Panama, Honduras, Nicaragua, and Guatemala. *Id.*; see also Brief for the U.S., *supra* note 4, ¶¶ 10-11.

20. An *ad valorem* tariff is a tax levied as a percentage of the value of the imported goods. For example, if a product were imported at a price of \$100, then a 20% ad valorem tariff would require a \$20 duty before the import may be allowed entry. See JOHN J. JACKSON ET AL., *LEGAL PROBLEMS OF INT'L ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT* 373-74 (3d ed. 1995).

21. See Brief for the U.S., *supra* note 4, ¶¶ 10-14. Between 1963 and July 1, 1993, the EC preserved a collective tariff rate on bananas of 20% ad valorem, but informed the GATT contracting parties on October 19, 1993 of its intention to renegotiate the 1963 concession consistent with GATT Article XXVIII, paragraph 5. See 1994 Panel Report, *supra* note 7, at 184. Through GATT Article II, GATT members are able to exchange and verify tariff commitments that publicly convey the maximum tariff level a country may impose on a specific good. See JACKSON, *supra* note 20, at 384-85. In the case of the EC's collective ad valorem tariff on bananas, individual member states were permitted to administer any tariff level they preferred so long as it did not exceed the specified 20% ad valorem maximum. Thus, individual EC states could differ in their treatment of banana imports with respect to the assessment of tariffs on bananas.

22. See Brief for the U.S., *supra* note 4, ¶ 17. At various times, Spain, France, and the United Kingdom administered tariffs and varying forms of quantitative restrictions, licensing requirements, import bans, or prohibitive taxes against third country banana imports. *Id.*

23. *Id.* ¶ 16. Germany absorbed more than one-third of the EC's total imports. *Id.*

entry of imports originating in Latin America.²⁴ Another contingent, comprised of Belgium, Denmark, Luxembourg, the Netherlands, and Ireland, allowed practically unobstructed passage of bananas into their markets irrespective of their place of origin.²⁵ These countries simply adhered to the established GATT binding of 20% ad valorem, allowing imports from Latin America to participate in supply and demand dynamics by growing with consumption.²⁶

B. THE LOME CONVENTION OF 1989 AND THE GENESIS OF EEC 404/93

From October 12, 1988 through November 27, 1989, representatives from the twelve European Economic Community member states²⁷ and the sixty-nine ACP countries negotiated a comprehensive multilateral scheme to improve trade, development, and regional coordination efforts known as the Fourth ACP-EEC Convention of Lome.²⁸ Under Protocol 5, the EC and ACP states agreed to "improv[e] the conditions under which the ACP States' bananas are produced and marketed and [to] continu[e] the advantages enjoyed by traditional suppliers in accordance with . . . Article I of [this] Protocol."²⁹ The "Banana Protocol" was not a novel idea in the Fourth Lome Convention; the three prior Lome Conventions, beginning in 1975, also provided for efforts to improve or preserve advantages enjoyed by producers, marketers, and traditional suppliers of ACP banana-producing countries.³⁰ The parties further stipulated that if the interested ACP states decided to establish a joint organization to fulfill the objectives of the Protocol, then the EC "shall" endorse such an organization and give due consideration to any request submitted.³¹ This type of language was consistent with the Common Agricultural Policy ("CAP"), which the EC progres-

24. *Id.* ¶ 15.

25. *Id.* ¶ 16.

26. *Id.*

27. In 1989 it was still formally the EEC, but it later changed to the European Community (EC). At that point, only twelve states were part of the EEC, a figure that increased to fifteen by 1996.

28. See 1989 Lome Convention, *supra* note 2, at 783 (outlining innovative provisions not included in Lome Conventions I, II, or III, such as a support mechanism for structural adjustment of economies of ACP countries and arrangements to address the general problem of debt).

29. See *id.* at 897.

30. See, e.g., Protocol 4 on Bananas of the Third ACP-EEC Convention of Lome, Dec. 8, 1984, 1986 O.J. (L 86) 160.

31. See 1989 Lome Convention, *supra* note 2, at 897.

sively formulated for the benefit of member states and in consideration of its international agreements, such as the 1989 Lome Convention.³²

With such a broad declaration of support for a joint organization formed by ACP countries, the EC Commission fulfilled the prophecy of EEC 404/93 on February 13, 1993.³³ As originally adopted, EEC 404/93 imposed a tariff quota³⁴ of two million tons per year on banana imports.³⁵ The tariff quota, however, was applied according to whether the imports originated in ACP or non-ACP states, prompting a set of specific import categories.³⁶

The first of these categories, "traditional imports from ACP nations," referred to the amount of banana imports originating in ACP states that had traditionally exported bananas to the Community.³⁷ EEC 404/93 exempted this category of imports

32. *Id.*

33. See *supra* notes 31-32 and accompanying text (highlighting the EC's manifest willingness to adopt measures to fully effectuate a structured import scheme for bananas); see also EEC 404/93, *supra* note 1, para. 16 (asserting *inter alia* that a chief objective of EEC 404/93 is "to ensure a satisfactory marketing of bananas produced within the Community and of products originating in the ACP states within the framework of the Lome Convention Agreements").

34. Tariff quotas provide a different tariff rate based on the amount of imports that have already entered the country. For instance, a tariff quota may be structured to allow the first 10 million tons of bananas to enter the territory at 10% ad valorem, but imports in excess of the 10 million ton quota would receive a higher 30% ad valorem tariff. See JACKSON, *supra* note 20, at 374.

35. See *Germany v. EU Council*, *supra* note 6, at 157. The EC Commission amended the stated figure of two million tons as a result of the Uruguay Round, which placed the quota level at 2.2 million tons. See Brief for the U.S., *supra* note 4, ¶ 20. The EC Commission has amended, supplemented, and implemented many of the original provisions of EEC 404/93 via regulations formulated through its banana management committee procedures. *Id.* ¶ 18. Note that the figures presented herein as part of EEC 404/93 may or may not be the actual percentages or amounts stated in the original promulgation, but are in some form the legitimate result of an amendment, decision, or order which proper authorities duly made. To minimize confusion, reference to such amendments, decisions, or orders have been omitted and will be presented as the substance of EEC 404/93, with the exception of the modifications effectuated by the "Framework Agreement on Bananas" ("BFA"). See *infra* Part I.D for a discussion of BFA.

36. See *Germany v. EU Council*, *supra* note 6, at 157. Technically, references to "third countries" in EEC 404/93 encompass all exporters of bananas to the EC so long as they are neither ACP or EC states. For purposes of this Note, all references to "third countries" refer to the relevant Latin American countries involved in some stage of the *Banana Case*. Latin American bananas are also commonly referred to as "dollar bananas."

37. See EEC 404/93, *supra* note 1, tit. iv, art. 15; see also *Germany v. EU Council*, *supra* note 6, at 157; Brief for the U.S., *supra* note 4, ¶ 21.

from any duties so long as the import levels did not exceed 857,700 tons.³⁸ Second, EEC 404/93 defined "non-traditional imports from ACP states" as exports from ACP states not considered to have been traditional exporters of bananas to the EC, as well as any imports from traditional ACP suppliers exceeding the 857,700 ton limit.³⁹ The Regulation subjected bananas entering the EC under the "non-traditional" category to the two-million ton tariff quota, which if otherwise exceeded would trigger a specific tariff of 750 ecus per ton.⁴⁰ Third, "imports from non-ACP countries," namely third countries or Latin American states, faced markedly different treatment. Any third country bananas entering under the specified two-million ton quota were to elicit a duty of 100 ecus per ton, while any amount entering over such quota would evoke a more substantial levy of 850 ecus per ton.⁴¹

In designing EEC 404/93, the EC Commission not only provided a tariff quota, but also fashioned a licensing scheme. Of course, whenever a tariff quota emerges, the more salient questions regarding its operation revolve around the licensing scheme for importers. EEC 404/93 requires the distribution of banana import licenses under the tariff quota among three categories of eligible "operators," A, B and C, each of whom possesses a particular share of the previous two-million ton cumulative tariff quota limit.⁴² Originally, Category A licenses granted 66.5% (1.33 million) of the cumulative two-million ton quota pool to "operators who marketed third country or non-traditional

38. EEC 404/93, *supra* note 1, ¶ 18 (stating that "traditional imports of bananas from the ACP fall outside the duty-free tariff quota as part of traditional quantities which takes account of specific investments already made under programmes for increasing production"). The stated amount of 857,000 tons curiously exceeded the maximum quantity of bananas imported from ACP countries by 24% in any year through 1992. See *Germany v. EU Council*, *supra* note 6, at 157.

39. See *Germany v. EU Council*, *supra* note 6, at 158.

40. See *id.* The category of "non-traditional imports from ACP states" primarily targets ACP countries that begin an export market after the passage of EEC 404/93. If such nations were to export, however, a certain quantity of bananas under the 2 million ton cap for duty-free ACP imports, then these non-traditional exporters also would receive duty-free treatment in spite of their non-traditional exporter status. *Id.* For an example, see *supra* note 34 and accompanying text. The term "ecu(s)" refers to "European currency units," which act as the EC's sole unit or account enabling it to draw up the Community's budget and facilitate financial interaction with trade partners such as the ACP coalition. EUROPEAN COMMUNITY-COMMISSION, THE ECU 5-7 (1987).

41. See EEC 404/93, *supra* note 1, art. 18; see also *Germany v. EU Council*, *supra* note 6, at 158.

42. See *Germany v. EU Council*, *supra* note 6, at 158.

ACP bananas.⁴³ Category B licenses allowed "operators who marketed Community and/or traditional ACP bananas" to import 30% (600,000) of the total quota.⁴⁴ Finally, 3.5% (77,000) of the quota was reserved as Category C licenses for "operators established in the Community who started marketing bananas other than Community or traditional ACP bananas from 1992."⁴⁵ In order for operators to obtain a license under either Category A or B, the license administrator must assess the average amount of the specific type of bananas (i.e. third country, traditional or non-traditional) that the operator had sold in the three most recent years for which data was available.⁴⁶

C. TO CHANGE OR NOT TO CHANGE: GATT LEGAL ATTACKS ON EEC 404/93

Latin American banana exporters did not wait for EEC 404/93 to take effect before invoking the GATT dispute settlement apparatus. They requested consultations with the EC to discuss individual state import regimes structured to satisfy Protocol 5 of the 1989 Lome Convention.⁴⁷ The first challenge to the then-unorganized protectionist mechanism came on June 12, 1992, when Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela requested consultations.⁴⁸ After these consultations failed to produce a mutually satisfactory resolution, the complainants requested the creation of a panel to investigate the matter.⁴⁹ On May 19, 1993, the Panel submitted its report which found sev-

43. See EEC 404/93, *supra* note 1, tit. IV, art. 19; Germany v. EU Council, *supra* note 6, at 158.

44. See Germany v. EU Council, *supra* note 6, at 158.

45. *Id.*

46. *Id.* at 158-59.

47. See *supra* note 31 and accompanying text; see also 1994 Panel Report, *supra* note 7, at 181. Both the GATT and the DSU include a provision of "consultations" that allows parties to enter into negotiations before they petition the WTO's intervention. See GATT, *supra* note 5, art. XXII; DSU, *supra* note 14, art. 4.

48. See GATT Dispute Settlement Panel Report on the European Economic Community - Members States' Import Regime for Bananas, June 3, 1993, available in LEXIS, Itrade Library, Gttwto file 11, *1 [hereinafter 1993 Panel Report].

49. See *id.* at *2. The complainants claimed that Belgium, France, Greece, Ireland, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom violated GATT Articles I, II, XI, and XIII, as well as Part IV of the General Agreement. Colombia submitted its own set of claims alleging violations of GATT Articles I, III, VIII, XI, XXXVI, and XXXVII; in the alternative, Colombia alleged that even if the EC states' actions were consistent with GATT provisions, complainants were still entitled to relief because of the resulting nullification and impairment of the benefits accrued under the GATT. *Id.* at *21-*22.

eral of the individual EC states' treatment of Latin American bananas to be protectionist and inconsistent with numerous GATT provisions.⁵⁰ Notwithstanding these findings, complainants received no relief from the individual countries as the EC collectively blocked adoption of the GATT report under pre-Uruguay Round dispute settlement procedures.⁵¹ The EC was able to block the adoption of the report only because its presentation occurred prior to the recently incorporated "Understanding of Dispute Settlement Procedures and Regulations."⁵² Former GATT dispute settlement procedures afforded losing parties in disputes the right to block adoption of a report by simply voting their opposition at the Council meeting even if the rest of the contracting parties voted to adopt the report.⁵³

Concomitant with the blockage of the 1993 Panel Report, the same complainants had already begun their efforts to avert the creation of the actual banana import regime as discussed on December 17, 1992 at an EC Ministerial meeting.⁵⁴ On February 19, 1993, Colombia, Costa Rica, Guatemala, Nicaragua, and Venezuela lodged a second request for consultations with the EC under the same GATT Article XXII:2 regarding the recently enacted EEC 404/93.⁵⁵ Again, the parties held consultations on the matter to no avail. Upon the claimants' request, the GATT Council formed a panel to hear the dispute and report its findings. The Panel found various components of the EC banana import system violative of GATT obligations: first, the panel held the 30% allocation of the tariff rate quota to Category B license operators on the basis of three-year marketings of EC or ACP bananas was inconsistent with GATT's MFN and national treatment obligations as defined in Articles I and III respectively; second, it found the duties levied on third country bananas in contravention of tariff binding obligations of Article II; finally, the panel deemed the preferential tariffs accorded to ACP bananas violative of Article I.⁵⁶

50. See generally *id.*

51. See Brief for the U.S., *supra* note 4, ¶ 1.

52. See generally DSU, *supra* note 14, at 404-33.

53. *Id.*

54. See 1994 Panel Report, *supra* note 7, at 181.

55. *Id.* The EC Council of Ministers rejected the first request for consultations reasoning that the decision taken on December 17, 1992 was not of a formal character so as to classify it as a "measure" under GATT Articles XXII:1 or XXIII:1, but rather was merely a policy-setting discussion about the future of the banana sector. *Id.*; see also *supra* note 47 and accompanying text.

56. See 1994 Panel Report, *supra* note 7, at 188-92. The Panel further posited a strict interpretation of Article XXIV:8(b) and thus failed to find the 1989

D. THE STRATEGY OF APPEASEMENT: THE FRAMEWORK AGREEMENT ON BANANA IMPORTS ("BFA")

Although the second panel's findings jeopardized the GATT validity of EEC 404/93 in the wake of both the first panel's findings and the EC's refusal to adopt its report, the EC found a way to avert a recalcitrant second report veto. The EC persuaded all of the complainants, except Guatemala, to abandon their multilateral efforts to secure an EC banana import regime consistent with GATT guidelines in exchange for country-specific shares of the total EC tariff-quota.⁵⁷ The agreement, called the "Framework Agreement on Banana Imports" ("BFA"), was signed on March 29, 1994.⁵⁸ Generally, the BFA fixed the basic tariff quota at 2.1 and 2.2 million tons for 1994 and 1995 respectively.⁵⁹ Further, the Agreement distributed shares of the global quota among the relevant Latin American countries as follows: Costa Rica (23.4%); Colombia (21%); Nicaragua (3%); Venezuela (2%); Dominican Republic and other ACP countries constituting the "non-traditional" category (90,000 tons); and Others (46.32%) for 1994 and (46.51%) for 1995.⁶⁰

Several features of the BFA made it especially appealing to the acquiescent Latin American countries. First, in case of *force majeure*, countries were allowed to fulfill their specific quotas with bananas from other BFA countries.⁶¹ Second, in the event a country notified the EC that it would be unable to fulfill its quota for that year, the Community would reallocate that country's undersupply among the other BFA countries based on their

Lome Convention to be valid grounds for an exemption to the EC's most-favored-nation obligations. *Id.*; see also Brief for U.S., *supra* note 4, ¶ 3. As a consequence of the second panel's report, the EC and ACP states applied to the GATT Council for a waiver of the Lome Convention of 1989, which it granted in December of 1994. Jack J. Chen, *Going Bananas: How the WTO Can Heal the Split in the Global Banana Trade Dispute*, 63 *FORDHAM L. REV.* 1283, 1301 (1995). The waiver provides the applicants with the right to derogate their obligations of GATT Article I:1 as required by the relevant provisions of the Lome Convention of 1989 until February 29, 2000, when the Convention expires. *Id.* at 1303.

57. Germany v. EU Council, *supra* note 6, at 155; see also Costa Rica-Colombia-Dominican Republic-European Community-Nicaragua-Venezuela: Framework Agreement on Banana Imports, Mar. 29, 1994, 34 *I.L.M.* 1 (1995) [hereinafter BFA].

58. BFA, *supra* note 57, at 1.

59. *Id.*

60. *Id.* The allocations among the BFA countries account for more than half of the total tariff quota.

61. *Id.* at 2.

percentage shares of the global quota.⁶² The BFA also aimed to manage any shift in quotas through the use of export certificates by BFA signatories. Under the BFA, Colombia, Nicaragua, and Costa Rica were authorized to issue export certificates for 70% of their exports to the EC.

The issuance of such export certificates, however, may carry some additional burdens depending on the operator category ascribed to license recipients. The BFA established that if a signatory issues an export certificate to a Category A or C operator, the certificate serves only as a prerequisite to the authorization of import licenses by the EC to such operators.⁶³ Category B operators, which historically marketed EC and/or traditional ACP bananas, may receive the export certificate free of any further import licensing requirement.⁶⁴ The BFA countries' ability to deliver export certificates to other countries has a special significance for U.S. companies. The American companies at issue not only handle the export of bananas from Latin American countries, but also serve as the operators or importers in Europe. As Category A operators, such American companies are required to obtain the import license in addition to the export certificate, an additional demand not required of B operators.⁶⁵

The BFA catalyzed the U.S. efforts towards reform of the EC banana import regime. Ironically, although the EC succeeded in defusing the Latin American challenge by persuading four of the claimants to desist from pursuing the adoption of the GATT panel report, it now faces the U.S.-led challenge which is plausibly more onerous than any previous attack.⁶⁶

62. *Id.* The shortfall provision also allows BFA countries to transfer their percentage shares to other Framework countries. Nicaragua exercised this option by transferring all of its 3% share to Colombia for both 1995 and 1996. Venezuela likewise transferred to Colombia 70% of its 2% share for 1995 and 30% of it for 1996. See Brief for the U.S., *supra* note 4, ¶ 25.

63. Brief for the U.S., *supra* note 4, ¶ 59.

64. See BFA, *supra* note 57, at 2. The United States, in its brief to the WTO panel, complains of discrimination by the EC in its distribution of 30% of the global quota to Category B operators when there is allegedly no basis for such an allocation in light of past marketings of traditional ACP and/or EC bananas during any rolling-three year reference period. See Brief for the U.S., *supra* note 4, ¶¶ 30, 113. It further alleges that the EC has only exacerbated its discriminatory measures by exempting companies receiving such B licenses from obtaining the additional license authorization by the EC in addition to the export certificate requirement pursuant to the Framework Agreement. See *id.* ¶ 4.

65. Brief for the U.S., *supra* note 4, ¶ 59.

66. See *id.* ¶ 3.

E. THE PEARL HARBOR OF THE BANANA WAR: WHY THE UNITED STATES BECAME INVOLVED

Until September 2, 1994, the United States had refrained from entering the banana war. At that time, Chiquita Brands International, Inc. and Hawaii Banana Industry Association, two major American-owned multinational enterprises, filed a petition under Section 301⁶⁷ of the 1974 Trade Act with the United States Trade Representative (USTR).⁶⁸ The petitioning entities exhorted the U.S. government to probe the discriminatory practices the EC, Colombia, Costa Rica, Venezuela, and Nicaragua were undertaking with respect to trade in bananas.⁶⁹ On October 17, 1994, the USTR responded to the petition by commencing an investigation of both EEC 404/93 and the BFA under section 302(a) of the Trade Act of 1974.⁷⁰ This section "authorizes the USTR to investigate acts, policies and practices of a foreign country that are unreasonable or discriminatory and burden or restrict U.S. commerce as defined by Section 301 of the Trade Act."⁷¹ Addressing separately the actions of each party subject to investigation, the USTR requested each country to withdraw from or re-negotiate the BFA.⁷² Upon receiving their refusal, the USTR initiated its probe of each country's involvement in the BFA.⁷³

67. Section 301 of the U.S. Trade Act of 1974 authorizes the executive branch to retaliate against practices of another country that are considered "unfair" in trade and commerce, thereby adversely affecting U.S. interests and those of its nationals. United States nationals may petition the government to initiate investigatory proceedings of a country's trade practices under Section 301. Many foreign countries have strongly criticized Section 301 because they feel it empowers the United States with unfettered latitude for retaliation. Such opposition may be warranted, because the President, through the United States Trade Representative Office, may retaliate, even where there is no showing that the alleged offense violates any international agreement. Additionally, U.S. officials may impose these sanctions without any regard to GATT/WTO authorities or to U.S. international obligations. See JACKSON, *supra* note 20, at 815-20 (introducing Section 301 and controversies surrounding it).

68. Proposed Determinations and Action Pursuant to Section 301: European Community Banana Import Regime; United States Request for Public Comment, 34 I.L.M. 350, 350 (1995).

69. *Id.*

70. *Id.*

71. *Id.*

72. See Initiation of Section 302 Investigations Regarding Policies and Practices of the Governments of Colombia and Costa Rica Concerning the Exportation of Bananas to the European Union; United States Requests for Public Comment, 34 I.L.M. 350, 350 (1995).

73. *Id.*

Concurrent with this inquiry, the U.S. government decided to study the possibilities of bringing a claim under the World Trade Organization.⁷⁴ In October 1995, the United States, as a signatory to the GATT and member of the WTO, filed a complaint before the WTO along with Mexico, Guatemala,⁷⁵ and Honduras. Ecuador joined the complaint in February of 1996.⁷⁶

1. *The American Legal Arguments for Relief Under Trade in Goods*

The United States has advanced a bi-level attack on the EC banana import regime. The first part of its challenge focuses on provisions of the GATT. Coverage under the GATT is limited to transactions involving goods and excludes services. Under the rubric of trade in goods, the United States first cites GATT Article I:1 as a prohibition against the EC's duty free treatment of non-traditional ACP bananas entering within the tariff quota safe harbor, and its discrimination against below-quota third country bananas which are subject to a 75 ecu per ton duty.⁷⁷

Second, the United States rests its challenge on Article XIII, which covers "non-discriminatory administration of quantitative restrictions ("QRs")."⁷⁸ Generally, Article XIII mandates that a GATT member which justifiably employs tariff quotas

74. The American inquiry into the agreement between the EC and the BFA countries, Venezuela, Costa Rica, Nicaragua, and Colombia, has tentatively ended in a series of bilateral agreements with the respective countries to renegotiate the BFA. Any efforts to comply with the agreements, however, will probably lack any diligence until the panel of the subject dispute submits its final report. Telephone Interview with Pam Waltzer, Partner, McDermott Will & Emery, Washington, D.C., Counsel for Chiquita Banana, Inc. (Nov. 7, 1996).

75. Guatemala was the only claimant of those in the second dispute that refused to abort its efforts to pursue legal action under GATT against EEC 404/93 in exchange for a country-specific quota allocation. See *supra* note 57 and accompanying text.

76. *Agriculture: WTO Dispute Panel Begins Hearing on EU Banana Regime Complaint by U.S.*, 13 Int'l Trade Rep. (BNA) No. 36, at 1423 (Sept. 11, 1996).

77. See *supra* notes 37-41 and accompanying text (discussing the EC regulations); Brief for the U.S., *supra* note 4, ¶ 64. The United States concedes that the GATT Council waived the EC's MFN obligations with respect to certain preferential treatment which the Lome Convention required. It maintains, however, that the Convention only requires preferential treatment for traditional ACP bananas, not non-traditional ones. *Id.*; GATT, *supra* note 1, art. I (requiring GATT members who provide certain trade preferential treatment to other countries to unconditionally and immediately accord the same treatment to other GATT members).

78. Brief for the U.S., *supra* note 4, ¶ 66-89. GATT Article XIII, ¶ 1 states: "[n]o prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party . . .

may do so provided it does not administer the tariff quota scheme in a discriminatory manner.⁷⁹ It follows that Article XIII applies Article I's critical MFN principle to the administration of quantitative restrictions. Within this general prohibition, the United States focuses on Article XIII:2, which compels countries utilizing QRs to abide by the "equitable market access distribution" principle.⁸⁰ This component to Article XIII:2 obligates GATT members who validly employ import restrictions to "aim at a distribution of trade in such product approaching as closely as possible the shares which [the Members] might be expected to obtain in the absence of such restrictions."⁸¹ Article XIII:2(d) further permits countries that allocate a quota among supplying countries to "seek agreement with respect to the allocation of shares in the quota with all other contracting parties having a *substantial interest* in supplying the product concerned."⁸²

In its brief to the WTO, the United States asserts that the EC's tariff quota, as modified by the BFA, offends the equitable "market access distribution" principle.⁸³ In support of its argument, the United States contrasts specific country market allocations to BFA countries and the lack thereof to non-BFA countries.⁸⁴ For example, the United States cites the EC specific quota allocation of 44,000 tons to Venezuela, a BFA party, in spite of average imports from Venezuela to the EC of only 90 and 45 tons for the periods of 1989-1991 and 1990-1992 respectively.⁸⁵ While such a seemingly incongruent quota allocation occurred under the BFA, non-BFA countries such as Guatemala, Ecuador, and Honduras, which collectively exported 716,535 tons to the EC between 1990 and 1992, received no country-specific quota.⁸⁶ While the United States concedes that Article XIII

unless the importation of the like product of all third countries . . . is similarly prohibited or restricted." GATT, *supra* note 5, art. XIII, ¶ 1.

79. See Brief for the U.S., *supra* note 4, ¶ 67 (reiterating Article XIII's premise of non-discrimination in the administration of quantitative restrictions).

80. See *id.* ¶ 69.

81. See GATT, *supra* note 5, art. XIII, ¶ 2.

82. *Id.* ¶ 2(d) (emphasis added).

83. Brief for the U.S., *supra* note 4, ¶ 70.

84. *Id.* ¶ 74.

85. *Id.*

86. *Id.* ¶ 75, tbl.1. Although the provision for a country using QRs to enter into an agreement with respect to quota allocation among supplying parties provides certain leverage to interested parties, the provision clearly states that such an agreement is available to supplying countries with a *substantial interest* in the product concerned. See GATT, *supra* note 5, art. XIII, ¶ 2(d). The

does not prevent a country from providing allocations to countries that do not meet the *substantial interest* criteria, it underscores that any quota allocations must conform with the reasonable expectations that GATT members would have regarding their market shares in the absence of such import restrictions.⁸⁷

In addition, the United States complains that the BFA allows for reallocation of shortfalls of banana exports among the BFA signatories if they petition for it. The United States maintains that permitting two BFA countries to decide between themselves to reallocate the shortfall is equally inconsistent with the obligations of Article XIII, which instead would obligate the EC to allocate any unmet country-specific quota on a non-discriminatory basis among all historical suppliers.⁸⁸ Whatever the EC's actual motivation may be for the BFA, the United States claims that Article XIII:2 proscribes the manner in which the EC allocated market shares in its tariff quota scheme. It specifically condemns the EC's disregard of the proportions of the total quantity or value of the exports that BFA and non-BFA GATT members supplied during previous representative periods.⁸⁹

relevant issue for this Note lies in whether the United States has such *substantial interest* in the subject product to make it a proper party in petitioning the EC to modify the BFA scheme pursuant to the principle of proportional market access distribution. Chiquita Inc. has different operations throughout Latin America. It has production operations in Colombia and Costa Rica (BFA countries) and also in Guatemala, Honduras, and Panama (non-BFA countries). It also operates purchasing offices in Ecuador and Mexico, both non-BFA countries. In order of rank, the strongest production venues are: Panama, Costa Rica, Honduras and Guatemala. Telephone Interview with Chiquita Banana, Inc. (February 7, 1997). These facts crystallize the U.S.' objection to the BFA shortfall reallocation provision because some of its major banana-producing and distribution operations are excluded from a potential increase to their export volumes. The injury Chiquita, Inc. alleges, through the U.S. government, focuses on this specific inability of the four complaining parties to reach higher proportions of the tariff quota, where Chiquita, Inc. is present in some capacity. The U.S. claim and request for relief on this issue, however, is identical to the claim and injury alleged by non-BFA banana producing and exporting Latin America countries. See discussion *infra* notes 159-60 and accompanying text.

87. Brief for the U.S., *supra* note 4, ¶ 75.

88. *Id.* ¶¶ 87-89.

89. See *id.* ¶ 69. In an incredulous tone, the United States challenged the EC's preferential treatment of banana imports from some non-GATT members whose highest export levels have never approximated the specific country quota allocated them by the EC regime. To this end, the United States questioned the legal basis in GATT of Protocol 5 of the 1989 Lome Convention in concert with the BFA. The United States alleges that the effects of their concurrent operation not only provide ACP countries preferential treatment in trade in bananas,

Finally, the United States vehemently attacks the EC's licensing scheme as unduly burdensome, complex, and inconsistent with the WTO Licensing Agreement, GATT Articles I:1, X:3, III:4, and the Trade Related Investment Measures Agreement ("TRIMS").⁹⁰ The United States juxtaposes licensing for traditional ACP bananas with the "baffling" licensing complexities that are applied to imports from third countries.⁹¹ The United States points to five distinct, but cumulative, steps that create such a disparately cumbersome licensing process for importers of third country bananas: (1) distribution of licenses based on three operator categories (A, B, and C); (2) distribution of licenses to A and B operators according to three activity functions, which erode legitimate license eligibility; (3) export certificate requirements established pursuant to the BFA; (4) two-step rounds to administer overbids on non-BFA countries; and (5) distribution of additional hurricane licenses to EC and ACP producers and distributors.⁹² The United States claims that the EC established this multi-layered licensing process to achieve specific Community policies such as: (1) keeping quota rents within the Community through the general use of import licenses; (2) providing business to EC-owned or controlled distribution companies through the allocation of 30% of the global quota to Category B operators; and (3) attempting to prevent a WTO challenge to its entire regime through the BFA.⁹³

2. *The Alleged Effects of the EC Import Regime on American Companies*

Collectively, the United States argues that the EC banana import regime has injured American banana marketing companies by undermining their ability to obtain the market share they enjoyed prior to the regime.⁹⁴ As noted above, the United States blames this diminution in market access on discriminatory treatment of third country bananas, discriminatory application of country-specific allocations, and the discriminatory

but also grants non-GATT members preferential treatment, while failing to extend similar treatment to certain GATT third countries that have larger exporting capacities. *See id.* ¶ 71.

90. *See id.* ¶¶ 92-134. The GATT and the Licensing Agreement seek to insulate members from improper use of licensing schemes which may serve to disadvantage certain importers to the benefit of domestic goods or license operators. *See JACKSON, supra* note 20, at 431.

91. *See* Brief for the U.S., *supra* note 4, ¶ 90.

92. *Id.* ¶ 27.

93. *Id.* ¶ 102.

94. *See id.* ¶¶ 147-50.

allocation of 30% of the total quota to Category "B" operators. In particular, the United States complains most indignantly about the issuance of 30% of the third country tariff-rate quota ("TRQ") to B operators, who had scarcely any history of distributing or transporting non-ACP and non-EC bananas. It characterizes the effects of such issuance as an incentive for importers to purchase EC and/or traditional ACP bananas given that no importers of such types of bananas have ever approached the allocated percentage quota.⁹⁵ The United States extracts the crux of its argument from the 1994 Banana Panel report, which states that "B operator eligibility criteria [was] inconsistent with GATT Articles I:1 and III:4, because they provide incentives to purchase other origin bananas."⁹⁶ The Panel further observed that "operators wishing to increase their future share of bananas benefitting from the tariff quota would be required to increase their current purchases of EEC or traditional ACP bananas."⁹⁷

In response to the U.S. assertion, the EC justifies granting 30% of the TRQ to Category B firms through its policy of "cross-subsidization," which was the result of a "difficult political compromise in 1993."⁹⁸ The EC explained that "cross-subsidization" achieved valid Community policies "through issuing licenses to import [third country] bananas to those who traded in Community or ACP bananas, [in order to provide both] financial compensation for the higher production costs of [EC and ACP] bananas, [and] also act as an incentive for the market to become more integrated, and to encourage operators to trade in both "dollar" and EC/ACP fruit."⁹⁹ Notwithstanding this purported justification, the United States fears that the EC purposefully planned such a system to siphon business away from American companies and into EC-owned or controlled companies by encouraging such importers to purchase EC and/or traditional ACP bananas.¹⁰⁰

95. See *id.* ¶¶ 112-14.

96. *Id.* ¶ 113.

97. *Id.*

98. *Id.* ¶ 30.

99. *Id.*

100. See Brief for the U.S., *supra* note 4, ¶¶ 113-15, 127; see also *supra* note 95 and accompanying text. Note that the arguments the United States made with respect to inequitable administration of the EC's tariff quota or the BFA reallocation shortfall provision do not differ at all from the interests of the Latin American co-complainants. Both the United States and the Latin American countries want to increase the tariff quota level corresponding to them, either individually or as a collective entity.

In sum, the United States presented an exhaustive array of legal grounds on which the WTO's Dispute Settlement Body ("DSB")¹⁰¹ may consider granting relief in terms of trade in goods. Although the United States claims to have sustained injury under both the GATT and the General Agreement on Trade in Services ("GATS"),¹⁰² this Note maintains that the United States lacks standing only with respect to claims made under the GATT, which solely covers transaction of goods. This Note does not opine on the propriety of the DSB to consider granting relief based on the U.S. arguments premised on the GATS, on which the other prong to the American attack against the EC banana regime rests. The field of trade in services is embryonic, as is its foundational Services Code, which remains undeveloped in interpretive substance. Considering the hypothesis of this Note, the presence of the United States as a party in the *Banana Case* remains puzzling because of its removed nature from the production of the transacted goods, being a mere marketer rather than a substantial producer of such goods. This distinction essentially disables the U.S. from properly asserting its claim for restitution as a matter of right under GATT Article I because it is not a logical recipient of such benefit.¹⁰³

Before examining the U.S. and International Court of Justice's ("ICJ") doctrines of standing, which provide the analytical framework to address the propriety of the American involvement in the *Banana Case*, it is imperative to consider the amenability of the GATT dispute settlement system to a doctrine of standing. Mindful that both U.S. courts and the ICJ are strictly adjudicatory in nature, and may operate in different climates than the one in which the DSB functions, one must consider whether the nature and mandate of the WTO's dispute settlement apparatus lends itself to a standing requirement. To focus this inquiry, it is necessary to examine the provisions in the WTO Charter that empower panels to hear disputes, as well as the purpose and nature of the dispute settlement process.

101. The 1994 Dispute Settlement Understanding provided for the creation of this novel dispute settlement organ called the Dispute Settlement Body ("DSB"), which is essentially the WTO Council acting in its dispute settlement role. See PIERRE PESCATORE ET AL., HANDBOOK OF WTO/GATT DISPUTE SETTLEMENT 72 (1996).

102. General Agreement on Trade in Services (GATS), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS, GATT Sales No. 1994-4 (1994).

103. The distinction between a producer and marketer is analyzed in detail *infra* Part IV.A.

II. GATT/WTO DISPUTE SETTLEMENT LAW

A. ARTICLE XXIII AND THE 1994 UNDERSTANDING

During the Uruguay Round negotiations, the GATT contracting parties agreed to create the World Trade Organization, upon whom fell the responsibility of administering the dispute settlement system.¹⁰⁴ GATT dispute settlement procedures delineate a system whereby members of the GATT and other WTO agreements can seek to enforce the extensive rights and duties the GATT/WTO imposes on them.¹⁰⁵ Article XXIII, which serves as the GATT's principal provision for dispute settlement, states that:

[I]f any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of (a) the failure of another contracting party to carry out its obligations under this Agreement, or (b) the application by another party of any measure, whether or not it conflicts with the provisions of this Agreement, or (c) the existence of any other situation, the contracting party, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.¹⁰⁶

To understand the scope of the dispute settlement mechanism, one must accept the general premise on which GATT is founded: "to constrain governments from imposing or continuing a variety of measures which restrain or distort international trade."¹⁰⁷ Thus, the key to the effective functioning of the system lies in preserving the presumed "balance" that parties reach through negotiations of maximum tariff levels, which is the lifeblood of the General Agreement.¹⁰⁸

104. See PESCATORE, *supra* note 101, at 12. The Agreement establishing the World Trade Organization ("WTO") marked a new era in GATT history. It primarily provided a common institutional framework for parties to GATT and other agreements under the auspices of the WTO to advance their trade relations. Of particular importance to our discussion, the WTO serves as the forum for trade negotiations and dispute settlement between parties to the Agreements. *Id.*

105. See *id.* at 70-71.

106. GATT, *supra* note 5, art. XXIII.

107. JACKSON, *supra* note 20, at 290.

108. *Cf. id.* at 331 (discussing the incumbent duty of a party who has violated a GATT provision in spite of circumstances that made the violation inevitable to compensate the parties affected by such a violation in order to restore the "balance" of obligations or concessions). Generally, the GATT aims to control the protection countries afford to their domestic products through three principles: Article I's Most-Favored-Nation ("MFN") treatment, Article III's na-

Article XXIII permits contracting parties, after having exhausted consultations with each other, to request the formation of a panel to hear the matter.¹⁰⁹ One or both parties may lodge the request with the GATT Council, which is then obligated to grant the request.¹¹⁰ Neither the GATT Council nor the panel, however, possess the means by which to evaluate a complainant's stake in the dispute. Without a determination of whether an interested GATT member has the appropriate stake to be a proper party to a dispute, the WTO dispute settlement system

tional treatment, and Article XI's prohibition against quantitative restrictions (QRs). See PESCATORE, *supra* note 101, at 18. The MFN principle obligates each GATT member to treat other GATT parties at least as well as it treats any other country with regard to imports or exports. Article I focuses on "border measures" imposed on products before they pass through customs. See JACKSON *supra* note 20, at 298. On the other hand, the concept of national treatment concerns internal taxation and regulatory measures. Article III aims to eliminate internal border restrictions that may *affect* the sale, offering for sale, purchase, transportation distribution or use of imports. To this end, this provision prohibits members from imposing on imports different internal taxes, internal charges, laws, regulations or other requirements from those it imposes on domestic products. See *id.* at 299. Finally, Article XI, albeit with several prominent exceptions, provides for the general elimination of QRs. Such a conditional dictate embodies GATT's basic philosophy in respect of import restraints, which asserts that they should be in the form of maximum tariff levels negotiated by GATT parties. See *id.* at 423. With these three principles pervading several of the General Agreement's provisions, the core of the GATT rests in Article II where tariff negotiations have produced a schedule of tariff concessions of all member states, on which the delicate "balance" of conditions of competition is canvassed. *Id.* at 298. The interplay between these four articles seeks to create the highest degree of transparency in the actions countries take to conduct trade with each other. *Id.*

109. See PESCATORE, *supra* note 101, at 72. A panel typically consists of three international trade experts who have received the approval of the disputants. Under Article XXIII and the DSU, the GATT Council is required to establish a dispute panel if one contracting party alleges that another has transgressed its obligations under the GATT. The panel considers the merits of the case, formulates a report, and recommends the appropriate action to alleviate the dispute. See JACKSON, *supra* note 20, at 327. Note that the basic outline of the dispute settlement process depicts the GATT Council's duties as merely to find the panelists who are charged with evaluating the dispute and formulating a report. The process is devoid of any principled basis for determining whether the party bringing the claim has a proper stake or interest in the alleged controversy.

110. See JACKSON, *supra* note 20, at 341 (noting that Article 6.1 of the DSU clearly sets out a complainant's right to have a panel established). The Contracting Parties established the GATT Council in 1960. Since the parties traditionally met only once a year, they concluded that an entity was needed to handle the large volume of issues that emerged in the interim. Thus, the GATT Council along with several committees, which invited the participation of any and all GATT members, assumed nearly all of the powers the members possessed. The Council generally meets monthly and requires consensus in its decisions. See PESCATORE, *supra* note 101, at 12.

faces the perils of an ill-crafted process for filing and accepting complaints. Moreover, political and economic influences plague the environment of the WTO, which improper parties may exploit to the detriment of fair dispute settlement administration. Hence, these observations trigger valid concerns regarding the lack of a principled doctrine of *locus standi* to determine whether claimants have the *requisite stake* and should be entitled to represent the injured interests in the adjudication of a claim.

B. THE NATURE OF WTO DISPUTE SETTLEMENT: A MORE ADJUDICATORY CHARACTER

Through Article XXIII, the founding GATT parties adopted a dispute settlement provision without answering basic questions about its character — should it be legalistic or pragmatic?¹¹¹ One group of GATT members, including the United States, argues that the dispute settlement mechanism should operate under a judicial model to “promote more precise decisions on the merits of disputes and more effective implementation of decisions.”¹¹² Such a model perceives the General Agreement as a “balance of concessions.”¹¹³ The notion of “balance of concessions” is premised on the ideal of reciprocity. Generally, a GATT country provides tariff concessions for goods that other countries produce more efficiently. Conversely, the same GATT country bargains to obtain a tariff concession for a product that *it* produces more efficiently than the other countries. The negotiating countries thus attempt to exchange tariff concessions that are similar in value, which forges a balance and creates defined commitments governed by the general obligations pervading GATT, such as the MFN and national treatment obligations.¹¹⁴ According to this characterization, the WTO as a

111. See PESCATORE, *supra* note 101, at 75 (addressing these two conflicting models).

112. *Id.*

113. *Id.*

114. See JACKSON *supra* note 20, at 379-80, 383-84. A common problem with tariff negotiations are “free-riders.” GATT Article I’s MFN obligation requires that the most favorable treatment a GATT member affords to any country with regards to a tariff or non-tariff benefit must be equally afforded to all GATT members. This means that some GATT members who have not bargained for some benefits may free-ride or enjoy them without having given any tariff concessions in return. See *id.* Although the GATT principle of unconditional MFN allows for members who have not bargained for such benefits to “free-ride” on the coattails of other members’ bargains, a country claiming violation of MFN is limited by the language of Article I. Such language does not give rise to a claim

dispute settlement organ seeks to restore the "balance of concessions" when contracting parties upset the GATT's equilibrium by obtaining compensation from the transgressors of the code of conduct or allowing the adversely affected party to retaliate in kind.¹¹⁵

Contrary to the legalistic model, pragmatists, such as the EC and Japan, espouse a more flexible approach to dispute settlement procedures.¹¹⁶ The "pragmatic" or "antilegalistic" model treats dispute settlement as a vehicle to nudge contracting parties towards a mutually acceptable solution to any dispute.¹¹⁷ Unlike the legalistic model, the pragmatic model does not approach the General Agreement as a code of conduct, but rather relies on the collective commitment of the GATT parties to enter into and maintain their agreements with each other.¹¹⁸ This sort of "good faith" approach seems to disfavor the WTO's use of compulsory measures to remedy the breach of GATT members' obligations.

Negotiators of the Uruguay Round, however, casted their imprimatur on a more legalistic than pragmatic model for the WTO dispute settlement system.¹¹⁹ This assertion is supported by the creation of an Appellate Body with the authority to review panel decisions, and language in the DSU that all but elim-

by a certain category of free-riders. The DSB should recognize that GATT Article I is not grounds for a claim for the restoration of benefits by a country which does not produce the subject good or "like product" in its territory. Article I unconditionally extends these benefits to all countries that produce or will produce the subject good. See GATT, *supra* note 5, art. I; see also GATT ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 32 (6th ed. 1994) (explaining the interpretive history of "originating in" and country of origin concepts used in Article I). Hence, it is inferable the obligations that arise from the negotiations are defined by the product and its producing countries, not by the interests foreign countries or their nationals may have in such products. See discussion *infra* Part IV.A.

115. See PESCATORE, *supra* note 101, at 75.

116. *Id.*

117. *Id.*

118. *Id.* The United States has predominantly lobbied for a more adjudicatory or legalistic dispute settlement GATT model, while the EC and Japan have continuously opposed it. *Id.* Less developed countries and non-European developed nations tend to favor a more legalistic model because it seems to offer more protection for countries with little political and economic leverage in international trade negotiations. *Id.*

119. See JACKSON, *supra* note 20, at 336 (stating that some drafters of the Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) favored a more judicial-setting for dispute settlement); see also *id.* at 348 (underscoring the panels' practice of citing other panels' decisions suggesting a more consistent use of precedent, although panels are not required to consider any previous decisions in the disposition of matters).

inates GATT members' ability to veto panel reports or Appellate Body decisions.¹²⁰ Such additions to the dispute settlement process arguably enhance the credibility of the system in maintaining the commitments that negotiators exchanged during negotiations.¹²¹

In light of the DSB's movement towards a more adjudicatory model, the absence of a doctrine of *locus standi* is likely to become a more prominent deficiency in the WTO dispute settlement mechanism. Accepting the legalistic model's construction that GATT is premised on a "balance of concessions," the WTO must examine the parties who request formation of panels in view of the rights corresponding to such parties and whether such rights entitle parties to remedies that will restore the "balance."

Since the GATT members themselves, through adoption of the DSU, defined the WTO's role consistent with an adjudicatory dispute settlement organ, a standing requirement should not emerge as a revolutionary concept, but rather as a necessary component of the adjudicatory process. The lack of a principled basis on which to decide whether a specific petitioner possesses the *appropriate stake or interest* in the dispute to bring the subject claim before the panel casts doubt on the WTO's ability to settle disputes fairly. Such a principle of legal standing is notably relevant to the participation of the United States in the *Banana Case*. A standing requirement would enable the DSB to determine whether the parties who have asserted a claim are the proper advocates for the equitable resolution of the dispute. Despite the variety of arguments the United States advances in its brief, the WTO, through the DSB, ought to deny the relief the United States seeks in light of American and international legal standing principles. To analyze this hypothesis in detail, it is necessary to first explore the principles of standing as both U.S.

120. DSU, *supra* note 14, arts. 16-17. Perhaps the most compelling change in the procedures of dispute settlement occurred in the manner in which contracting parties adopt panel reports. Prior to the DSU, GATT members could unilaterally veto a report by simply voting against it. Pursuant to the DSU, a panel report may avoid immediate adoption, if it either gains appellate review or if the Dispute Settlement Body (DSB) decides by *consensus* not to adopt the report. *Id.* Thus, the DSU has practically eliminated any veto power for GATT members. Notwithstanding the legalistically oriented dispute settlement procedures, nineteen clauses throughout the GATT obligate members to engage in consultations in specific instances with an eye towards avoiding unnecessary intervention of the DSB. See JACKSON, *supra* note 20, at 338.

121. See JACKSON, *supra* note 20, at 332-33 (outlining arguments in support of a more legalistic model).

courts and the International Court of Justice have crafted and applied them.

III. THE DOCTRINE OF STANDING: A UNIVERSAL LEGAL CONCEPT

A. THE UNITED STATES: STANDING UNDER THE "CASE OR CONTROVERSY" REQUIREMENT

Legal systems have historically operated to afford the citizens or entities under the governance of their laws the access to judicial processes that enable them to seek redress for wrongs they have incurred. Structured into three branches of government to heed constitutionally mandated separation of powers, the United States assigned the duty of adjudicating the claims of its citizens to the judicial branch. The judicial branch's jurisdiction is limited, however, to those activities that are appropriate under its province.¹²² The "Case-or-Controversy" requirement of Article III of the U.S. Constitution¹²³ is such a limitation on the judiciary's scope of appropriate action.¹²⁴

The "Case-or-Controversy" requirement, however, identifies the justiciability of disputes rather than the legal standing of parties or the propriety of such parties to bring a suit.¹²⁵ The jurisprudential doctrine of standing is an essential and well-established part of the "Case-or-Controversy" requirement of Arti-

122. *Allen v. Wright*, 468 U.S. 737, 749 (1984); see generally JAMES E. RADCLIFFE, *THE CASE-OR-CONTROVERSY PROVISION* 11 (1978).

123. U.S. CONST. art. III, § 2.

124. *Allen v. Wright*, 468 U.S. at 750. Article III of the U.S. Constitution defines that "judicial power" shall extend to certain types of "cases" and "controversies." Case law has provided much needed interpretation of the scope of terms like "judicial power" and "case or controversies." For example, in *Musk-rat v. United States*, 219 U.S. 346 (1911), the Supreme Court defined the grant of judicial power as "the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction." *Id.* at 361. In another case, *Osborn v. Bank of the United States*, the Court held that "a case arises within the meaning of the Constitution, when any question respecting the Constitution, treaties or laws of the United States have assumed 'such a form that the judicial power is capable of acting on it.'" RADCLIFFE, *supra* note 122, at 35.

125. *Baker v. Carr*, 369 U.S. 186, 204 (1962) *cited in* *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975) ("[S]tanding imports justiciability: [justiciability asks] whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Article III As an aspect of justiciability, the standing question is whether the 'plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf.'"). Cf. RONALD D. ROTUNDA, *MODERN CONSTITUTIONAL LAW: CASES AND NOTES* 1092-93 (4th ed. 1993).

cle III. Through common-law and statutory development, the American doctrine of standing has become a principled basis on which aggrieved citizens may ascertain whether they are empowered to assert a legal right before a court of law.¹²⁶ An inquiry into standing aims to determine whether the claimants seeking redress before the court are the appropriate parties to exercise such rights in order to prevent or redress a wrong.¹²⁷ Thus, the federal court must assess whether the party¹²⁸ seeking a remedy has "the proper interest in the legal right to invoke federal judicial power."¹²⁹ By requiring plaintiffs to possess "the

126. See *Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 663 (1993) (holding contractor association had standing to challenge the constitutionality of city ordinance). Standing is not the same as the "Case-or-Controversy" constitutional requirement, but is rather an indispensable component of this requirement. *Id.*

127. *Allen v. Wright*, 468 U.S. at 752. *Cf. Warth v. Seldin*, 422 U.S. at 498 *cited in Allen v. Wright*, 468 U.S. at 750-51 (reducing the "question of standing [to] whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues").

128. American courts apply the doctrine of standing based on the *type* of petitioner that opts to invoke federal judicial authority. Specifically, the courts subject taxpayers and non-taxpayers to distinct and separate doctrinal rubrics. *Compare Flast v. Cohen* 392 U.S. 83 (1968) *with Valley Forge Christian College v. Americans United for the Separation of Church and State, Inc.*, 454 U.S. 464 (1982) (applying contrasting analytical approaches to standing issues based on tax-payer and non-taxpayer status). The primary analytical structure of this Note is premised on the non-taxpayer formula, but incorporates some of the elements of tax-payer standing into the overall analysis. Non-taxpayer standing doctrine essentially requires an "injury in fact" in addition to a "causal connection" between the action complained of and the injury alleged. See *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979) *and Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976) *both cited in Valley Forge*, 454 U.S. at 472. In *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59 (1978), the majority stated that "where the injury alleged is a concrete and particularized one which will be prevented or redressed by the relief requested, the basic practical and prudential concerns underlying the standing doctrine are generally satisfied when the constitutional requisites are met." *Id.* at 80-81.

129. RADCLIFFE, *supra* note 122, at 95 (explaining the usage of the term "'interest' [] to denote the parties' relationship to the disputed legal right: Does the party possess the requisite relationship to the disputed legal right so that he should be permitted to commence or defend a 'case' or 'controversy'"). See also *Flast v. Cohen*, 392 U.S. at 88 (asserting that "it is both appropriate and necessary [for courts] to look at the substantive issues for another purpose, namely, to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated."). Federal standing seeks to exclude claimants from adjudicatory circumstances when they lack sufficient personal stake in the outcome of the controversy as to assure a necessary level of concrete adverseness which would sharpen the presentation of issues. See *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972) (underscoring that "[t]he requirement that a party seeking review must allege facts showing that he is himself adversely

proper interest," the common law demands that plaintiffs show they possess the requisite relationship to the disputed legal right so that they should be permitted to commence or defend a "case or controversy."¹³⁰

Common law played a substantial role in fashioning a standing doctrine. The common law resulted in the establishment of an "irreducible constitutional minimum" that the complaining party must satisfy to be a proper party to the dispute.¹³¹ This established test contains three elements: (1) the plaintiff must have suffered an "injury in fact" — an invasion of a legally protected interest which is *concrete and particularized*, and which is actual and imminent, not merely conjectural or hypothetical; (2) there must be a causal connection between the injury and the alleged injurious conduct, which means that "the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . t[he] result [of] the independent action of some third party not before the court'; and (3) "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision'."¹³² In addition to this established test, federal courts acknowledge their latitude in utilizing prudential limitations, which provide non-constitutional judgments about what constitutes wise policy in administering the judiciary, to determine the standing of a certain claimant.¹³³

affected . . . does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome."); see also JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 75 (4th ed. 1991).

130. See *Flast v. Cohen* 392 U.S. at 102 ("inquiries into the nexus between the status asserted by the litigant and the claim he presents are essential to assure that he is a proper and appropriate party to invoke federal judicial power.").

131. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

132. *Id.* at 560-61. Plaintiffs who claim that their injuries are not the direct result of a governmental action against them per se, but rather are the product of governmental action against a third party, may have recourse to legal remedies as well. In *Lujan*, the court cited a substantially higher burden of proof on plaintiffs who are not themselves the object of the government action or inaction which they challenge, but declined to exclude the possibility of redress for them. *Id.* at 562.

133. See *Valley Forge*, 454 U.S. at 474 (highlighting federal courts' discretion to invoke prudential limitations or considerations as a policy tool in administering the standing doctrine). For example, the prudential standing rule normally bars litigants from asserting the rights or legal interests of others, as well as prohibits the adjudication of generalized grievances more appropriately addressed in the political branches. See *id.* at 474-75. Despite the rule being premised on judicial self-governance, Congress may limit the courts' application

B. THE INTERNATIONAL COURT OF JUSTICE (ICJ): STANDING IN INTER-GOVERNMENTAL BODIES

Other established national judiciaries, such as the Canadian and British systems, employ standing doctrines that seek to achieve the primary objective of determining whether a party who brings a claim before a tribunal possesses an appropriate stake in the controversy to advocate such interests.¹³⁴ This norm also extends into the international legal model, as evidenced by the International Court of Justice's use of a standing doctrine. The ICJ acts as the principal organ of the United Nations ("U.N."), and derives its structure and function from a formal statute annexed to the U.N. Charter.¹³⁵ Although the ICJ's standing doctrine is not as well-developed as the American doctrine, it nonetheless provides guidance for the creation of a principled GATT doctrine of standing. This is especially true because the multilateral political climate in which the ICJ administers its doctrine is akin to the environment in which the WTO settles disputes. The ICJ's two-part standing test, articulated in *Case Concerning Barcelona Traction, Light and Power Company* ("*Barcelona Traction*"), requires an evaluation of (1) whether the defendant state broke an obligation towards the complaining national state with respect to its nationals, and (2) whether only the party to whom an international obligation is due is bringing the claim in respect of its breach.¹³⁶

The crux of the ICJ's standard focuses more on the duties or obligations that a state owes another state in order to ascertain whether the aggrieved state has any cause of action grounded in

of it by acting to remove it per statutory preemption so long as it does not exceed Article III case or controversy requirements. See *Ass'n of Data Processing Service Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970); see also NOWAK & ROTUNDA, *supra* note 129, at 80, 83. Not surprisingly, the Supreme Court has tended to grant standing more often when matters fall within the "zone of interest" protected by a federal statute, or if a statute appears to specifically grant standing in the case. *Id.* at 76.

134. See generally MINISTRY OF THE ATTORNEY GENERAL, REPORT ON THE LAW OF STANDING 10-18 (1989); PATRICK BIRKINSHAW, GRIEVANCES, REMEDIES AND THE STATE 259-63 (2d ed. 1994).

135. Article XIV of the United Nations Charter founded the International Court of Justice ("ICJ"), which acts as the principal organ of the United Nations ("U.N.") pursuant to the Charter. U.N. CHARTER art. XIV, para. 92. Original U.N. members embodied the structure and function of the ICJ in a formal statute annexed to the U.N. Charter. Statute of the International Court of Justice, June 26, 1945, Stat. 1031.

136. *Barcelona Traction*, *supra* note 16, ¶ 35 (quoting Advisory Opinion, *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174, 181-82 (Apr. 11)).

a right. This sort of inquiry requires delving into the process whereby parties create and assume obligations, and into the rights that countries have to seek reparations for the transgression of the accorded duties. Further, the ICJ test aims to extend its adjudicatory jurisdiction only to those parties who are *proper* and logical recipients of the obligations that were breached. Thus, only such parties deprived of the benefits flowing from an obligation as a result of the alleged violation of such obligation have standing to bring a claim before the ICJ.

The foregoing two models provide the GATT with a starting point on how to sculpt a formal standing doctrine. The architects of a GATT doctrine of standing should aim to develop a hybrid of these two models within the parameters of both the specific mission of the GATT adjudicatory entity to maintain the "balance of concessions," and the particular dynamics that surround GATT as a multilateral effort to liberalize trade. The application of both doctrines to the *Banana Case* confirms the need for such a formal doctrine of standing in the GATT dispute settlement mechanism.

IV. WHY THE UNITED STATES LACKS STANDING IN THE BANANA CASE

A. ANALYSIS UNDER THE AMERICAN DOCTRINE OF STANDING

In 1994, Chiquita Brands International, Inc., the Hawaiian Banana Industry Association, and Dole Foods ("U.S. firms") collectively exhorted the United States government to file a petition before the WTO to protect their interests in the trade of bananas with the EC and the BFA countries.¹³⁷ The U.S. firms, as companies that produce, distribute, and market bananas world-wide, sought to preserve the volume of Latin America bananas they shipped to Europe, the world's largest market for bananas.¹³⁸ The firms provide these services through their U.S. incorporated parent companies or through their owned and controlled subsidiary entities established in EC or third countries.¹³⁹ These firms summoned the U.S. government's intervention by alleging their inability to handle the same or larger volume of bananas for marketing and distribution serv-

137. See *supra* Part I.E. (explaining the process the United States chose to act on the U.S. firms' petition).

138. See Brief for the U.S., *supra* note 4, ¶ 140.

139. *Id.* ¶ 141.

ices as a result of the EC banana import regime and the BFA.¹⁴⁰ Under the American doctrine of standing, the U.S. government must demonstrate it has the *requisite interest* in the assertion of its legal right to seek redress for this alleged wrong.¹⁴¹ In doing so, the United States must first show that it suffered a *concrete and particularized injury* in fact as a result of the EC banana regime and the BFA.¹⁴² Primarily, the United States argues that three different actions taken under these two arrangements caused injury: (1) discriminatory treatment of below-quota third country bananas;¹⁴³ (2) discriminatory application of country-specific allocations and allowance for intra-BFA country reallocation of shares in the BFA,¹⁴⁴ and (3) distribution of import licenses amounting to 30% of the total third country tariff quota to Category B operators in contravention of Articles I, III, X and the Licensing Agreement.¹⁴⁵ The United States adduced evidence that such actions by the EC not only diminished the exportable quantities of bananas from third countries, but also reduced the U.S. firms' business in handling bananas because of, *inter alia*, higher duties on third country bananas and no country-specific allocations to non-BFA countries.¹⁴⁶ Further, the United States, a marketer of third country or non-traditional ACP bananas (Category A),¹⁴⁷ specifically claimed that the disproportionate issuance of 30% of the third country tariff-rate quota licenses to marketers of EC and/or traditional ACP bananas resulted in a concrete injury to U.S. firms because they are unable to reach the banana marketing volumes prior to the licensing scheme.¹⁴⁸ The U.S. firms undeniably suffered injury from the EC's actions. These injuries and their relief, however,

140. See *supra* Part I.E.2. The U.S. firms engage in distribution services which encompass "buying and selling of bananas, compliance with regulatory and administrative requirements, quality control, inspection and testing, the physical movement of the bananas over long and short distances, ripening prior to retail sale, and sales promotion activities." See Brief for the U.S., *supra* note 4, ¶ 140.

141. See *supra* notes 126-29 and accompanying text.

142. See *supra* note 132 and accompanying text.

143. See *supra* note 77 and accompanying text.

144. See *supra* notes 78-89 and accompanying text.

145. See *supra* note 95 and accompanying text; see also *supra* notes 42-46 and accompanying text (discussing EEC 404/93's licensing scheme).

146. See Brief for the U.S., *supra* note 4, ¶¶ 147-50. EEC 404/93 uses "third country" to refer to any non-ACP country that exports bananas to the EC. The BFA grants country-specific quota allocations to five of these third countries. Thus, all BFA and non-BFA countries are "third countries," but only five "third countries" are BFA countries.

147. See *supra* note 42-45 and accompanying text.

148. Brief for the U.S., *supra* note 4, ¶ 149.

must be examined in light of the GATT's dispute settlement mission.

When assessing the element of particular injury under the American doctrine of standing, the WTO/DSB must recognize that its primordial objective is to restore the "balance of concessions" that a transgression against GATT principles or an impediment to the achievement of a GATT objective may disrupt.¹⁴⁹ In other words, to determine whether injury exists under the GATT dispute settlement mission, a party must show that it is a logical recipient of the benefits it claims to have lost because it has a direct relationship to the product on which the corresponding obligation is premised.¹⁵⁰ GATT Article I impliedly asserts the requirement of such a relationship between the claimant/tariff beneficiary and the product by mandating that "any . . . privilege . . . granted by any contracting party to any product *originating in* . . . any other country shall be accorded immediately and unconditionally to the like product *originating in* . . . the territories of all other contracting parties."¹⁵¹ This language illuminates an intention by GATT's drafters to require a nexus between the GATT member claiming discriminatory treatment and the product of which it complains. The complaining country has the latitude to properly claim discrimination even to the extent that another GATT member refuses to afford the same treatment as afforded to all other members to a "like product" created in its territory.¹⁵² Article I, however, fails to allow GATT members to properly claim discrimination by other GATT members for products that are produced in the territory of other GATT members.¹⁵³

In this case, the injuries to which the United States points affect both U.S.-based parent firms and U.S.-owned subsidiaries in Latin America and Europe that engage in the production, distribution, and marketing of Latin American bananas to serve the EC market. Such subsidiaries exploited the benefits of any obligations the EC assumed toward substantial Latin American banana producing countries. According to Article I, the rights that arose out of negotiated trade concessions in bananas correspond to those countries that not only produce bananas, but also export bananas from within their territory. Guatemala, Hondu-

149. See *supra* notes 113-14 and accompanying text.

150. *Id.*

151. GATT, *supra* note 5, art. I (emphasis added).

152. *Id.*

153. See GATT ANALYTICAL INDEX, *supra* note 114, at 32.

ras, Ecuador and Mexico each produce and export bananas *originating in* their territory. The EC irrefutably injured the banana trade expectations of these Latin American countries by failing to afford the bananas which *originated in* their territories treatment as favorable as accorded to other GATT and non-GATT members. Thus, these Latin American third countries are each logical claimants to injury resulting from a violation that impairs their ability to export their home-grown bananas.¹⁵⁴

The injuries alleged by these third countries, however, are entirely different from the injuries the United States alleges its firms' marketing and distributing services incurred. As noted above, the only obligation the EC assumed under GATT was defined by the product in question and the territory in which it was produced. Because the United States is not complaining about its restricted ability to produce and export U.S.-grown bananas, it cannot rely on the MFN protection of Article I. Hence, the American claim of injury as a result of an infringement on its ability to export bananas grown in a foreign territory is misplaced. From this perspective, the United States would fail to meet its burden in asserting standing to seek relief for injuries that U.S. firms suffered under the GATT in terms of trade in goods.

Assuming *arguendo*, however, that the United States could prove that U.S. firms suffered a *particular and concrete injury*, it must then prove under the American doctrine that a *causal connection* exists between the lost benefits and the EC banana import regime and the BFA.¹⁵⁵ The United States may easily satisfy this element since EEC 404/93 and the BFA both prompted a decrease in exportable bananas in countries where U.S. firms operated, and allocated roughly one-third of the U.S.' previous tariff-quota licenses to Category B operators.¹⁵⁶

The final element of the American test is the likelihood of redressability by a favorable decision.¹⁵⁷ The U.S. plight for

154. *Id.*

155. See *supra* note 132 and accompanying text.

156. See Brief for the U.S., *supra* note 4, ¶¶ 149-50 (blaming EEC 404/93 for reconfiguring the Latin American banana-service market, which precipitated the transfer of a substantial portion of service activities, market-share, and profit-making opportunities enjoyed by the United States to other third country banana service firms).

157. See *supra* note 132 and accompanying text; see also *Warth v. Seldin*, 422 U.S. at 505-07 (highlighting a situation where the court declined plaintiff's standing because the requested relief would not have necessarily redressed their grievance).

standing succumbs before this final hurdle. Recalling the DSB's primary mission to restore the "balance of concessions,"¹⁵⁸ it must tailor a remedy that responds to the lost benefits that parties secured by virtue of their relationship to the product in question. Once again, the United States does not stand in a position to assert a legal right for relief given that it is not a substantial banana-producing nation, and thus not a logical beneficiary of any banana tariff concession accorded by the EC. The *Banana Case* presents a situation where goods are transacted between countries. Granting standing to the United States on behalf of U.S. marketing and distribution firms due to the EC's failure to administer its tariff quota equitably among BFA and non-BFA countries is incongruent. Accordingly, the Panel should fashion remedies based on its goal of restoring the "balance of concessions" only for those countries that are proper beneficiaries of the tariff commitment as defined by both the product in question and the territory in which such product originated. Under GATT, any relief warranted by the EC's banana schemes with ACP and BFA countries must respond to a violation of obligations regarding tariff concessions to banana-producing countries, which is a criterion the United States simply fails to satisfy. Even if the DSB considered the United States a banana-producing nation in light of its comparatively minimal production documented in its brief to the WTO, the DSB should consider fashioning relief equal to the value of U.S. losses incurred from being unable to export such bananas because of the EC's actions. This would still comport with the DSB's mission to restore the "balance of concessions," instead of overcompensating for the injury that transpired from the breach of tariff commitments. Thus, under the American doctrine of standing, Ecuador, Honduras, Guatemala, and Mexico satisfy the standing requirement, whereas the United States is an improper party to assert the interests of its national firms.

The policies underlying the American doctrine of standing fortify this conclusion. Motivated by the American adversarial system, jurists who molded this doctrine were concerned with having the most zealous advocacy possible in defense of the interests at stake in the controversy.¹⁵⁹ Logically, these jurists concluded that the specific parties with such interests at stake could advocate most effectively on their behalf, and thus could sharpen the issues and present the most favorable arguments to

158. See *supra* note 149 and accompanying text.

159. See *supra* note 133 and accompanying text.

the court.¹⁶⁰ In the *Banana Case*, the United States shares the same interests with the Latin-American countries in respect to the equitable administration of the tariff-quota and the BFA shortfall reallocation provision. They each want to maximize the level of bananas that can be exported to the EC from within the territories of the complaining Latin American countries. Although no injury need be alleged to claim a violation of the GATT, it is clear that the injury alleged as a result of the tariff-quota administration corresponds to the Latin American nations that produce and export bananas from within their territories, and they alone are the best advocates of their own interests. Surely, the U.S. presence in the claim of these two issues is dispensable given that any relief granted will satisfy the American interests equally as well.

The U.S. argument surrounding the issue of operator license administration, however, eludes such a categorical disposition. The interests of the United States with respect to this issue are separable from the interests of the Latin American complainants. Thus, without the United States as a co-claimant, the Latin American countries are not the most effective advocates for the United States with respect to the issuance of operator licenses. Such countries are concerned mostly with realizing their banana export capacity irrespective of which marketing firms handle the export/import processes of such bananas. The United States clearly holds more of an interest in protecting the massive market share that U.S. firms hold in banana marketing and distribution services to the EC. This issue, however, is better analyzed under the ICJ doctrine of standing discussed below.

The American standing principles provide a seemingly rigid filtration device to segregate parties who have the appropriate stake in the controversy from those who lack such requisite interest. International legal principles of standing add other valuable elements to the American formula. Furthermore, the doctrine of standing that the ICJ employs serves to enhance the possibility of a suitable GATT standing calculus because it presents a model shaped in a multilateral environment, rather

160. *Id.*; see also *Baker v. Carr*, 369 U.S. 186, 204 (1962) cited in *Flast v. Cohen*, 392 U.S. at 99 (identifying the "gist of the question of standing" [to be] whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure . . . concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions?").

than in an idiosyncratic national system, and more closely resembles the dynamics in which GATT operates.

B. ANALYSIS UNDER THE ICJ STANDING TEST

1. *Obligations and Rights of a State Under Barcelona Traction*

Over a span of almost two decades, the International Court of Justice heard *Case Concerning Barcelona Traction, Light and Power Company*, in which it analyzed the legal principles and policies overseeing a government's right to assert the interests of its national shareholders in a foreign company.¹⁶¹ Although the facts of *Barcelona Traction* vary considerably from the subject dispute, the majority's assessment of the claim to standing that interested parties assert is useful in exploring the limits on the United States' right to bring the claim of U.S. firms' before the WTO.¹⁶² The constructive component of *Barcelona Traction* lies not so much in its holding, but rather in the analytical guidance the court provides in scrutinizing (1) the extension of a state's diplomatic protection over its nationals, and (2) the obligations that states owe each other amidst legal standing and sovereignty concerns.

Barcelona Traction concerned a claim the Belgian government submitted against Spain on behalf of Belgian nationals and shareholders who owned over 90% of a Canadian corporation that owned the Spanish Barcelona Traction Company.¹⁶³ Belgium alleged that unlawful acts of Spanish authorities caused damage to the financial interests of its national shareholders in Barcelona Traction and thus entitled them to seek reparations from the Spanish government.¹⁶⁴ The Belgian complaint argued that the treatment Spanish courts afforded the Barcelona Traction Company in its pursuit of share transfer disputes related to other transactions harmed its shareholders stake in the company, and such an action was in contravention

161. *Barcelona Traction*, *supra* note 16.

162. The WTO and the ICJ differ significantly in their institutional framework and administration of dispute settlement. Notwithstanding these differences, the law the ICJ developed may serve as a useful guide to fashioning a viable standing doctrine for the WTO. The WTO might borrow the ICJ's "standing" guidelines since they both arguably operate in similar political multilateral climates.

163. *Barcelona Traction*, *supra* note 16.

164. *Id.* ¶¶ 28-29.

of international law principles.¹⁶⁵ The ICJ addressed the issue of standing before turning to the merits of the case.¹⁶⁶

The court framed the standing issue in terms of whether Belgium had a right to exercise *diplomatic protection* of Belgian shareholders in a company incorporated in Canada for violations of international law against the company rather than against the Belgian nationals themselves.¹⁶⁷ The ICJ evaluated Belgium's standing under the following two part test: (1) whether the defendant state (Spain) broke an obligation towards the national State (Belgium) in respect to its nationals, and (2) whether only the party to whom an international obligation is due is bringing the claim with respect to the breach.¹⁶⁸

In announcing such a test, the Court essentially reduced its task to determining whether Spain violated a right of Belgium "on account of its nationals' having suffered infringement of their rights as shareholders in a company not of Belgian nationality."¹⁶⁹ Hence, the disposition of whether Belgium had the legal capacity to bring its nationals' claim before the ICJ reposed on the existence (or absence) of a *right* belonging to Belgium and recognized as such by international law.¹⁷⁰

By acknowledging that the obligation an offending party violates must belong to the foreign state on account of its nationals, the court necessarily implicated the foreign state's exercise of *diplomatic protection* as the only vehicle through which the foreign state may assert a right on behalf of its nationals.¹⁷¹ The ICJ considered the foreign state's exercise of such a right as "necessarily limited to intervention [by a State] on behalf of its own nationals."¹⁷² The Court viewed the exercise of such right as limited to diplomatic protection "because, in the absence of a special agreement, . . . the bond of nationality between the State and the individual . . . alone confers upon the State the right of

165. *Id.* ¶ 28.

166. American standing doctrine principles theoretically mandate that courts conduct the standing analysis before considering the merits of a case. In practice, however, courts often evaluate the merits of a case and either grant or deny standing based on the validity or probable outcome of the case. See *NO-WAK & ROTUNDA*, *supra* note 129, at 82-83.

167. See *Barcelona Traction*, *supra* note 16, ¶ 32.

168. *Id.* ¶ 35 (quoting Advisory Opinion *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174, 181-82 (Apr. 11)).

169. *Id.* ¶ 35.

170. *Id.* ¶ 36.

171. *Id.*

172. *Id.* (quoting *Panevezys-Saldutiskis Railway*, 1939 P.C.I.J. (ser. A/B) No. 76, at 16 (Feb. 28)).

diplomatic protection, and [because such exercise of diplomatic protection must nonetheless envisage] the right to take up a claim and to ensure respect [for] international law¹⁷³ Thus, the Court reasoned that the question of whether a right corresponds to a foreign state and derivatively to its beneficiary nationals must be answered in light of general rules of *diplomatic protection*.¹⁷⁴

2. *Limitations to a State's Exercise of Diplomatic Protection*

The International Court of Justice underscored the general international rule that "[w]hen a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them."¹⁷⁵ The obligations a host state owes to foreign natural or juristic persons permanently situated in the host state, however, do not necessarily implicate the rights of a foreign state to assert the interests of its nationals situated in such foreign jurisdiction.¹⁷⁶ Consistent with this observation, the ICJ announced a compelling proviso to the general rule by distinguishing between the obligations a state owes the international community as a whole, and the obligations owed only to another state.¹⁷⁷ It considered the former type of obligations *erga omnes*,¹⁷⁸ which confer on all states a right to protection of

173. *Id.* (quoting *Panevezys-Saldutiskis Railway*, 1939 P.C.I.J. at 16).

174. *Id.* "Although individuals . . . have some independent status . . . in international law, the principle relationships between individuals and international law still run through the state, and their place in international life depends largely on their status as nationals of states." JACKSON, *supra* note 20, at 264 (quoting RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS OF THE UNITED STATES, Part II, Introductory Note at 70-71 (1987)). Notwithstanding this norm, international law and various international agreements are increasingly recognizing human rights of individuals and sometimes grant individuals relief before international bodies. *Id.* The slow trend towards recognizing individual rights in multilateral tribunals thus raises some questions as to the WTO's requirement for a state's exercise of diplomatic protection over its disgruntled nationals in order to assert a claim before the WTO.

175. *Barcelona Traction*, *supra* note 16, ¶ 33.

176. *Id.*

177. *Id.*

178. *Id.* Outlawing acts of aggression and genocide, or rules calling for the protection of fundamental human rights, such as measures against slavery or racial discrimination, exemplify the level of importance warranted for the host state to have an *erga omnes* obligation towards the international community as a whole. Hans W. Baade, *The Operation of Foreign Public Law*, 30 TEX. INT'L L.J. 429, 445 (1995). Another *erga omnes* obligation is embodied in the right of every state to live in peace, free of threat or use of force against its territorial

a particular legal interest from the host jurisdiction.¹⁷⁹ In other words, where *erga omnes* obligations are involved, individuals may assert their basic human rights on which the obligations are based without the intermediary of diplomatic protection.¹⁸⁰

The ICJ, however, failed to ubiquitously extend the same right to unequivocal assertion of a legal interest to all obligations a state assumes concerning the treatment afforded to the admitted national or juristic persons.¹⁸¹ In cases concerning non-*erga omnes* obligations, the performance of which is the subject of diplomatic protection, the Court specifically recognized *Barcelona Traction's* two-prong test as the means to determine whether the state seeking to protect the interests of its nationals may do so in accordance with international law principles of standing.¹⁸²

integrity or political independence. See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)* 1984 I.C.J. 168, 196 (Order of May 10) (dissenting opinion of Judge Schwebel).

179. *Barcelona Traction*, *supra* note 16, ¶ 33.

180. Baade, *supra* note 178, at 445. Whether any action taken by a state that offends GATT principles in the context of trade will ever rise to the level of *erga-omnes* is debatable. Theoretically, a party that violates basic human rights through some pernicious trade practice might bypass the need for diplomatic protection. In the context of GATT, the requirement for a state to exercise diplomatic protection over its nationals in order to assert a claim depends on the domestic legal effect that a particular country has given to the GATT. JACKSON, *supra* note 20, at 128. For example, the U.S. Congress enacted implementing legislation that made GATT part of a quasi-separate legal system from that of domestic law. See *Uruguay Round Agreements Act*, § 102; see also John J. Jackson, *Status of Treaties in Domestic Legal Systems*, 96 AM. J. INT'L L. 310, 313-15 (1992), reprinted in JACKSON, *supra* note 20, at 126. In effect, such an action by Congress prevents not only suits against the United States in its own courts but also requires American citizens to invoke their government's intervention in seeking relief from the WTO. *Id.* Although discussion of diplomatic protection may seem superfluous to the American involvement in the *Banana Case* because the U.S. government must bring any claim of American citizens under GATT, it is an essential component to the formulation of a GATT standing doctrine. The possibility that current and future GATT members may differ from the United States in the legal effect given to GATT vis-a-vis their domestic laws accentuates the need for such a discussion of diplomatic protection.

181. See *Barcelona Traction*, *supra* note 16, ¶ 35 ("It cannot be held, when one [*erga omnes*] obligation in particular is in question, in a specific case, that all States have a legal interest in its observance.").

182. *Id.*; see Baade, *supra* note 178, at 445 (juxtaposing the different recourse entities or individuals may have with respect to asserting a legal interest in cases where states owe an *erga omnes* obligation with cases where states owe a lesser obligation (non-*erga omnes*)).

3. American Diplomatic Protection over U.S. Firms

In *Barcelona Traction*, any obligations Spain owed Barcelona Traction stemmed from the international rule which mandates the extension of a host state's laws and protection to any foreign natural or juristic persons permanently situated in its jurisdiction.¹⁸³ With respect to these specific obligations, the ICJ did not consider "all States . . . to have a legal interest in their protection."¹⁸⁴ Hence, the Court categorized the Spanish authorities' failure to adequately protect the financial operation of the Barcelona Traction company or ensure the Belgian shareholders investment in the company as violations of non-*erga omnes* obligations.¹⁸⁵

In defining the type of obligations present in the *Banana Case*, it is inconsistent with the ICJ's broad guidelines to raise the magnitude of the EC's obligations to the United States, third countries, or their nationals above the *erga omnes* threshold. In short, to find any GATT obligations the EC assumed with respect to banana trade to be *erga-omnes* would dislocate the international law system of right recognition.

Unlike the U.S. doctrine of standing, a GATT standing doctrine should include an evaluation similar to the ICJ standing doctrine so that the DSB may properly assess whether diplomatic protection is warranted. A judgment on whether individuals may bypass seeking the cloak of diplomatic protection in order to assert their legal interests is therefore important. Those individuals who fail to rest their claim on the breach of an *erga-omnes* obligation are then compelled to pursue diplomatic intervention by their state. At this juncture, the DSB may apply the *Barcelona Traction* test to ascertain the legal standing of the parties in question, who merit close scrutiny considering that an improper assertion of interests by such state may impair the challenged country's sovereignty.¹⁸⁶ Any obligations the EC owes the United States with respect to its nationals and third countries should not rise to *erga omnes* status. Thus, the rights

183. See *supra* note 175 and accompanying text.

184. See *Barcelona Traction*, *supra* note 16, ¶ 33. The ICJ analyzed the Belgian claim in light of diplomatic protection principles which confirms its conclusion that any obligations Spain breached with respect to Belgium with respect to its nationals were non-*erga omnes*. See *id.*

185. See *supra* notes 175-80 and accompanying text.

186. See *Barcelona Traction*, *supra* note 16, ¶ 37 ("Diplomatic protection deals with a very sensitive area of international relations, since the interest of a foreign State in the protection of its nationals confronts the rights of the territorial sovereign . . .").

the United States seeks to assert by exercising diplomatic protection over these U.S. firms are subject to the *Barcelona Traction* test.¹⁸⁷

4. *The First Prong of the ICJ Standing Test Applied to the Banana Case*

The first part of the ICJ test requires the defendant state (EC) to have violated an obligation towards the United States in respect to its nationals.¹⁸⁸ Once again, this Note focuses strictly on the U.S. arguments related to trade in goods, under which the United States alleges that the EC violated Articles I, III, X, XI, and XIII through its enactment of EEC 404/93 and the BFA.¹⁸⁹ Although analysis of this prong of the test is similar to that of the injury element of the American doctrine, the question of whether the EC owed an obligation to the United States with respect to its nationals is less demanding. In response to this inquiry, the DSB should examine GATT's principal obligations in conjunction with the manner in which GATT parties formulate obligations toward each other during negotiations, while also considering the legal and economic premises on which GATT operates.

GATT represents an evolution of quasi-contracts which parties continuously seek to modify based on surveys of their production strengths and weaknesses in order to capitalize on and compensate for their competitive advantages and disadvantages.¹⁹⁰ This foundational impetus drives negotiation rounds, which occur every six to eight years. Parties manifest the obligations they assume toward each other in the negotiations. Naturally, reciprocity nurtures any motivation to accept an obligation. Irrespective of the unlikelihood of its genuine achievement, reaching a "balance of concessions" between all participants is the ultimate goal of GATT.¹⁹¹ The MFN principle, however, requires a state that affords certain tariff concessions to a GATT or non-GATT country to equally and unconditionally extend such privilege to all other GATT coun-

187. See *supra* note 182 and accompanying text.

188. See *supra* note 136 and accompanying text.

189. See *supra* Part I.E.1.

190. JACKSON, *supra* note 20, at 7-12, 15-18, 384-85. Although the commitments GATT members exchange must be honored pursuant to Article II, GATT recognizes the changing economic dynamics of the contracting parties and thus provides for opportunities to modify the schedule of concession pursuant to Article XXVIII. See GATT, *supra* note 5, arts. II, XXIII.

191. See *supra* notes 113-14 and accompanying text.

tries.¹⁹² The result of such a requirement is an aberration of the goal of "balance of concessions" because of the problem of free-riders it creates.¹⁹³ Notwithstanding this tension between theory and reality, the GATT functions remarkably well fueled by the concept of reciprocity while cautioned by the known exploitation of concessions by free-riders.

By virtue of GATT Article I's MFN obligation, the EC, as the world's largest banana importer, extended a fixed tariff concession to any GATT country that produced bananas and exported them from within the producing territory.¹⁹⁴ The United States has never produced bananas in its territory for exporting purposes. It therefore could not consider the small volume of bananas it produces to be a significant incentive for the exchange of a tariff concession. In spite of the low-volume of bananas the U.S. produces, Article I's MFN tenet commands that any benefit accorded to a country with respect to a product must be similarly extended to all GATT members.¹⁹⁵ This principle allows a country that is not a producing nation at the time the concession is extended to benefit from such concession if at any moment in the future it becomes a producer of the product (or *like product*) involved in the concession. Thus, if the United States ever increased its production to a level where it was able to export quantities to the EC, it would certainly have a more compelling argument for standing in a claim against the EC protectionist banana schemes.

Furthermore, because of the U.S. status as a country that does not produce bananas for export purposes, the EC cannot view the United States' current predicament as enticing enough to exchange concessions, to wit reciprocate the value of one tariff concession for the other. In contrast, the EC may consider Ecuador, Guatemala, and Honduras, all substantial Latin American banana producers, as worthy candidates for reciprocal tariff concessions in exchange for the EC's tariff obligations.¹⁹⁶ Such

192. See *supra* note 108 and accompanying text.

193. See *supra* notes 113-14 and accompanying text.

194. See *supra* notes 149-54 and accompanying text (explaining the implied limitations GATT Article I imposes on plaintiffs seeking to defend a claim in defense of a breach to an obligation in GATT).

195. See *supra* note 108 and accompanying text.

196. GATT commentators offer various reasons for utilizing tariffs as the preferred mode for advancing trade relations. For example, they posit that tariffs are more transparent than other trade barriers, a feature which facilitates negotiation for lower import duties. Further, scholars emphasize the incentives tariffs present exporters — once a GATT member commits to a tariff level, exporters are better able to project the production capacities of their businesses so

analysis is consistent with the notions of reciprocity and "balance of concessions," which are the cornerstones of GATT.¹⁹⁷ Thus, GATT portrays a web of obligations that are defined strictly by the product grown, manufactured, or processed in the territory from where it is exported. The salient question is whether the EC owes any obligation to the United States with respect to its nationals.

Based on GATT operating economic principles and the manner in which obligations are secured, any obligations the EC assumed as a result of tariff commitments on bananas run directly to substantial banana-producing GATT members who export such product to the EC. To allow the United States to seek relief for the alleged breach of an obligation concerning a product that it does not produce within its territory for export purposes is incongruent with GATT's premises.¹⁹⁸ Under the first prong of the *Barcelona Traction* test, the DSB should not decide the EC owed an obligation to the United States or much less that it breached an obligation owed to the United States with respect to U.S. firms.¹⁹⁹ Such a conclusion precludes the United States from successfully invoking diplomatic protection over its firms in order to assert their interests in the instant case. Accordingly,

they may make necessary industry adjustments to increase efficiency. By establishing a visible tariff goal for exporters, GATT encourages producers to become more efficient since doing so enables producers to "jump" the tariff hurdle and reap the financial rewards. See JACKSON, *supra* note 20, at 377 ("[I]f a foreign based industry is efficient enough, it will still be able to export to tariff-imposing countries."); see also 1994 Panel Report, *supra* note 7, ¶ 20, at 185 ("The fundamental principle embodied in the provisions of [GATT Art. II] were essentially the security and predictability of the tariff concessions granted by one contracting party to the remaining contracting parties.").

197. See *supra* notes 113-14 and accompanying text.

198. Ecuador, Honduras, Guatemala, and Mexico, however, did participate in achieving the balance of concessions. The DSU establishes a vehicle whereby GATT contracting parties may remedy disruptive factors to the negotiated balance of concessions. In this instance, the EC has a direct obligation to such parties as a result of the General Agreement, in which they are considered to be producers of the product involved in the concession and exporters of such product from within their territory. In other words, the Latin American claimants have a *right* in GATT to defend the producing and exporting interests on which the EC's obligations toward them rest, while the U.S. attempts to defend its firms' *interests* under the guise of the Latin American banana producers' legal rights. Cf. *Barcelona Traction*, *supra* note 16, ¶¶ 46-47; see also *Warth v. Seldin*, 422 U.S. at 499 ("even when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, [the U.S. Supreme Court] has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.").

199. See *supra* note 136 and accompanying text.

the United States should fail to obtain a favorable judgment regarding its legal standing before the DSB.

5. *The Second Prong of the ICJ Standing Test*

Assuming, *arguendo*, the DSB found that the EC *did* owe an obligation toward the United States with respect to its nationals, the U.S. claim would likely fail to satisfy the second prong of the ICJ's *Barcelona Traction* test. The second prong requires that only the party to whom an international obligation is due can bring a claim with respect to its breach.²⁰⁰ The interests the United States attempts to protect are both *different and the same* as the interests of the other four Latin American countries. In its brief to the WTO concerning trade in goods, the United States alleges that both EEC 404/93 and the BFA impermissibly infringe on the GATT Articles I, III, XI, XIII and the WTO Licensing Agreement.²⁰¹ Further, the United States claims American firms suffered a deleterious decline in their distribution and marketing levels of third country bananas on which the success of U.S. firms primarily relied.²⁰² Specifically, the United States complains of the EC's disproportionate issuance of 30% of the available operator licenses to Category B importers who only handle EC and/or traditional ACP bananas. The Latin American claimants, on the other hand, simply demand the restoration of the benefits accorded to their banana production and export industry. Both the United States and the Latin American claimants share the goal of maximizing the permissible level of exportable bananas to the EC. Although the prayer for relief the United States advances in its brief to the WTO aims to alleviate the concerns of all claimants involved, it does not correlate with the different obligations that the EC would have assumed with respect to the banana producing Latin American nations and the marketing and service oriented United States.

To illustrate, the 1993 and 1994 GATT panels respectively held the EC banana import regime, and perhaps the BFA, offend GATT's MFN and national treatment principles.²⁰³ The panels decided in favor of the petitioning Latin American banana producers (Colombia, Costa Rica, Guatemala, Nicaragua, and Venezuela) that enjoyed a substantially higher market share of

200. See *supra* note 168 and accompanying text.

201. See *supra* Part I.E.1.

202. See *supra* Part I.E.2.

203. See *supra* Part I.C.

banana imports prior to EEC 404/93 and the BFA.²⁰⁴ Presumably, this finding will, *a fortiori*, support a finding of relief for the current co-claimants Ecuador, Guatemala, Mexico, and Honduras. Like the 1994 claimants, the current Latin American petitioners have a legitimate claim to defend their export market shares since they are substantial exporters of bananas and are currently subject to less favorable treatment than other GATT third countries. Once the EC restores a level of banana exports satisfactory to the Latin American countries, however, these Latin American claimants would have no further interests in a claim against the EC.²⁰⁵ To the contrary, the United States may feel the interests of the U.S. firms to be ill-served by the Latin American countries' acquiescence.²⁰⁶ Thus, the danger for conflicting interests emerges with respect to relief.

This reality underscores the risks present in a situation where a claimant (U.S.) with interests sufficiently separable from those of its co-claimants prejudice the possibility for clear analysis of the dispute's merits as well as for an equitable resolution of the matters. In a hypothetical where the EC was found to owe an obligation to the United States regarding trade in bananas, the WTO should discern that neither the United States nor the Latin American countries are the proper advocates for the interests of the other party. The obligations assumed by a GATT member are premised on the rights and interests that recipient countries possess. In the current *Banana Case*, the United States should not be permitted to maintain legal standing under the second prong of the ICJ test because the Latin American countries are the only parties who may bring a claim for the breach of a specific international obligation premised on the preservation of their export markets. Thus, they are the only parties with the right to request relief congruent with the EC's violations of the obligations due the Latin American claimants under GATT. The United States may, however, have standing with respect to the breach of a different obligation that

204. *Id.*

205. This proposition assumes that the Latin American countries ignore any political pressures from or cultivated loyalties toward the U.S. firms' interests.

206. The reaction the United States demonstrated toward Costa Rica and Colombia's involvement in the BFA poignantly illustrates the conflict of interests that permeate this joint-claim. See *supra* Part I.D-E. If the EC was found to owe an international obligation to the United States, the DSB should find such obligation sufficiently different from that owed to the producing Latin American countries so as to preclude any U.S. involvement in the claim premised on the obligation owed to the Latin American countries. Of course, this would not foreclose a separate claim by the U.S. against the EC.

implicates the direct and specific interests of its domestic firms. By identifying the separate claims of the United States and the Latin American complainants, the DSB may fashion calculated relief that will permit a fairer approximation of the value of the remedy due based on the GATT violations. Not coincidentally, this result would once again comport with the primary GATT notions of "balance of concessions" and "reciprocity."²⁰⁷

Despite the uncertain outcome of the U.S.' plight for standing under the second prong of the ICJ test, the DSB should adjudge the issue of U.S. standing in the *Banana Case* on the basis of the crucial first prong of the test. In sum, despite the U.S.' allegations, the EC's GATT violations with respect to trade in bananas are particular to the rights of banana exporting countries, and only incidentally affect U.S. firms' interests. As previously noted in *Barcelona Traction*, an interest does not automatically translate into a right,²⁰⁸ and the manner in which a host state protects both foreign interests and rights turns largely on the obligation it owes the foreign state and its nationals.²⁰⁹ Based on the foregoing distinction between the obligations the EC owes the Latin American third countries and the adversely, but incidentally, affected interests of the U.S. firms, GATT's international tribunal should not permit the U.S. government to assert diplomatic protection over the U.S. firms.²¹⁰ Thus, under the *Barcelona Traction* doctrine of standing, the

207. See *supra* notes 113-14 and accompanying text.

208. *Barcelona Traction*, *supra* note 16, ¶ 46 ("[Spain argued] the measures complained of, although taken with respect to *Barcelona Traction* and causing it damage, constituted an unlawful act vis-a-vis Belgium, because they also, though indirectly, caused damage to the Belgian shareholders in *Barcelona Traction*. [The Court perceived Spain's argument as] merely a different way of presenting the distinction between injury in respect of a right and injury to a simple interest. . . . [E]vidence that damage was suffered does not *ipso facto* justify a diplomatic claim. . . . This in itself does not involve the obligation to make reparation."); see also *supra* note 198 and accompanying text.

209. See *supra* Part IV.B.3-5.

210. See *Barcelona Traction*, *supra* note 16, ¶ 87 ("When a State admits into its territory foreign investments or foreign nationals it is bound to extend to them the protection of the law. However, it does not thereby become an insurer of that part of another State's wealth which these investments represent. Every investment of this kind carries certain risks. The real question is whether a right has been violated, which right could only be the right of the State to have its nationals enjoy a certain treatment guaranteed by general international law, in the absence of a treaty applicable to the particular case."). Likewise, GATT fails to insure the risks U.S. firms took in relying on the obligations the EC assumed with respect to all substantial banana-producing nations that export from within their territory. See *supra* notes 149-54 and accompanying text.

DSB would deem the United States an inappropriate party to bring the current claim under GATT in terms of trade in goods.

V. PRINCIPLES THAT SHOULD GUIDE A GATT DOCTRINE OF STANDING

Until now, the absence of a principled GATT doctrine of standing has not notably prejudiced the administration of GATT dispute settlement. The *Banana Case*, however, illuminates the difficulty GATT panels may encounter without the benefit of concrete guidelines to help determine whether claimants have the appropriate stake in the controversy to adjudicate their claims before the GATT. An operational GATT standing doctrine must develop in accordance with the demands that GATT's political and economic environment places on both contracting parties and the WTO dispute settlement body.

In light of the prevalent legalistic nature of the DSB, the WTO should fashion devices that will enable it to administer its dispute settlement duties consistent with its modified philosophy.²¹¹ Assuming that the DSB's primary mission is to promote compliance with GATT rules by contracting parties,²¹² a doctrine of *locus standi* furthers this goal by allowing only those parties with claims grounded in the breach of specific obligations to seek redress before the panel. The DSB, by excluding inappropriate claimants, accomplishes two objectives: (1) it is able to fashion relief in accordance with Article XXIII that is equivalent to the injury caused by the offending party, and (2) to pre-empt the significant presence of any additional political or economic influences that come before the panel by denying standing to those parties who improperly represent the rights of other contracting parties.²¹³

With respect to the first objective to formulate adequate relief, the DSB may rely on both Article XXIII and the DSU to grant an injured party leave to either receive compensation from

211. See *supra* Part II.B. Like the U.S. standing doctrine, a GATT standing doctrine would not operate in a vacuum and thus may require the development of prudential considerations. If GATT does not speak directly to standing of a particular class of parties, the DSB will have to resort to such prudential considerations to limit its role in resolving disputes that fall outside assumed obligations. See *Warth v. Seldin*, 422 U.S. 499-501 (delineating some prudential limitations the Court applies); see also *supra* note 133 and accompanying text.

212. See *supra* note 107 and accompanying text; see also PESCATORE, *supra* note 101, at 76 ("Clearly the goal of the dispute settlement system should be to promote compliance with GATT rules.").

213. PESCATORE, *supra* note 101, at 75-76; see *supra* Part II.B.

the offending party or suspend concessions afforded to the offending party so as to restore the negotiated "balance of concessions."²¹⁴ The process of formulating remedies to negate the effect of injuries on the balance of concessions is inherently imperfect because a myriad of factors may contribute to an alleged injury.²¹⁵ The DSB, however, ought to scrupulously search for a remedy that will afford the injured party equitable compensation for its anticipated benefits from the accorded concessions, or the tools with which to restore its particular balance of concessions by withdrawing equivalent concessions.

In the *Banana Case*, the DSB unnecessarily faces the U.S. petition for relief, which may cause the collective prayer for relief to exceed the level of relief warranted by the injury.²¹⁶ The DSB, by hearing an improper claimant, is faced with the possibility of overcompensating for the injury. To grant relief adequate to address a bona fide claim against a GATT violation or "imbalance," panels must evaluate the relationship between the alleged injury and the requested relief. Currently, the Panel in the *Banana Case* confronts a tenuous relationship between the injury the United States alleges its firms suffered and its prayer for relief. In the event the Panel were to find, as its predecessors did in 1993 and 1994, that the EC breached its obligations under GATT toward the Latin American third countries, what further legitimate relief could the U.S. firms enjoy other than the derivative relief that the Latin American countries would receive?²¹⁷ Any relief directed at the United States in addition to this derivative relief would amount to overcompensation, thereby preventing the DSB from repairing the existing imbalance to the negotiated schedule of concessions. If the Latin American third countries can restore the balance of concessions by asserting the claim on behalf of their interested operators as substantial exporters/importers of the product in question, then the U.S. presence is not only superfluous, but also prejudicial to fair administration of dispute resolution in an international tribu-

214. PESCATORE, *supra* note 101, at 75; see DSU, *supra* note 14, art. 22, at 422 ("Compensation and the suspension of concessions or other obligations are temporary measures available . . .").

215. Cf. JACKSON, *supra* note 20, at 390-91 (describing the well-known "Chicken War" dispute between the United States and the EU concerning permissible magnitude of concession withdrawals allowed to the U.S. in response to the EU's violation of its GATT binding on poultry).

216. See *supra* Part IV.B.5.

217. See *supra* note 203 and accompanying text.

nal.²¹⁸ The WTO, however, may minimize the degree of such risk through the doctrine of standing. With such a tool, the DSB would be better equipped to fashion a remedy that will re-establish the lost equilibrium of concessions based on the degree of injury sustained from the GATT violation. To achieve this, however, the WTO must first ensure that parties without an adequate stake or interest in the dispute are precluded from requesting relief additional to that which proper claimants requested.

Yet, opponents of a GATT doctrine of standing may posit that no such risk of overcompensation exists when the relief joint-claimants request, whether proper parties to the dispute or not, is equal. Although such an argument may reach a level of theoretical persuasion, the climate in which GATT and the WTO operate impedes it from gaining practical acceptance. Architects of a GATT standing doctrine should observe not only the manner in which panels fashion relief, but also the influence and resources that parties have in advancing claims before a tribunal. Since the DSB, like other tribunals, generally limits its opinions in panel reports to arguments that disputants raise, without *sua sponte* asserting any unstated arguments, the WTO should not permit more resourceful parties to craft a litigation strategy for less developed countries.²¹⁹ Such a result would "poison the environment" in which GATT operates by producing a constant struggle among smaller countries to ally themselves with larger, richer joint-claimants. Although larger countries are unlikely to involve themselves in costly litigation without having interests at stake, their involvement in the dispute ought to withstand the standing test so as to ensure that their rights, and not just

218. Critics of the United States' involvement in the banana controversy could analogize its participation as being a hired gun of legal advocacy equipped with more ample resources and political muscle than its co-claimants. Accordingly, the ability for a nation without the proper stake in the controversy to bring a claim on behalf of others could be perceived as offensive to the integrity of the international legal system. This might suggest that the EC, the United States and the more influential international trade figures could act as "hired guns" in claims that do not directly implicate their rights, but may incidentally affect their nationals' interests. Cf. *Singleton v. Wulff*, 428 U.S. 106, 114 (1976) (emphasizing that the court depends on effective advocacy and that third parties are usually the best proponents of their own rights). Conversely, the United States could be perceived as a "bully" imposing its interests upon the rights of other countries seeking relief under GATT.

219. Cf. 1994 Panel Report, *supra* note 7, at 177 (an example of a typical GATT panel report which structures its legal analysis of every disputed issue based on the specific allegations stated in the respective parties' briefs and arguments).

their interests, were violated by the alleged offender.²²⁰ At the same time, major international trade nations should be prohibited from pursuing or advocating the claims corresponding to the rights of smaller countries in order to serve their own self-interests.²²¹

In the *Banana Case*, U.S. lack of standing would not, however, deny its voice in a formal GATT proceeding. Article 10 of the GATT's "Dispute Settlement Understanding" provides measures whereby third parties to disputes may argue their alleged stake or interests in the matter.²²² They may do so by presenting their arguments at a panel hearing of all interested non-claimants and submitting a written brief.²²³ For example, St. Lucia, Dominica, St. Vincent, and several other East Caribbean states who individually maintain substantial interests in the resolution of the banana dispute, but were prevented from joining the claim, used the DSU as a means of recourse.²²⁴ Through Article 10 of the DSU, the DSB granted these countries the opportunity to present briefs to argue their positions.²²⁵ In this case, the United States' involvement should more properly assume this role of third party intervenor because it possesses no legal standing to advocate a position on behalf of the Latin American complainants, despite its interest in the matter. Such third countries are capable of defending their own rights accrued under the obligations assumed by the EC regarding trade

220. See *supra* text accompanying note 198.

221. See Robert E. Hudec, et al., *A Statistical Profile of GATT Dispute Settlement Cases: 1948-1989*, 2 MINN. J. GLOBAL TRADE 1, 56-59 (1993). In their statistical analysis of GATT dispute settlement cases, the authors adduced evidence that a stronger or more influential GATT country has a higher rate of violation findings when it asserts a claim before the GATT. Furthermore, the United States alone obtained the lowest percentage of negative outcomes even into the late 1980s. *Id.* at 59. The Article suggests that such a consistent result in favor of the United States as a complainant is attributable to its wholehearted investment of resources into the complaint. *Id.* at 59.

222. See DSU, *supra* note 14, art. 10, at 413 ("Any Member having a substantial interest in a matter before a panel . . . shall have an opportunity to be heard by the panel and to make written submissions to the panel.").

223. *Id.*

224. See *Agriculture: WTO Dispute Panel Begins Hearing on EU Banana Regime Complaint by US*, *supra* note 76, at 1423 (providing a parallel situation of disgruntled Caribbean parties that, despite their substantial interests in the matter, failed to participate as parties in the *Banana Case*).

225. See *id.* (stating the manner in which the Caribbean states interested in the banana dispute have been ordered to present their positions rather summarily, and thus forced to rely on the EC to argue their plea vociferously).

in bananas, and thus *stand* in a favorable position to obtain equitable relief.²²⁶

A GATT doctrine of *locus standi* yields beneficial results to the WTO's dispute settlement administration. For instance, it would mitigate tendencies of larger and more dominant GATT countries, with interests rather than rights at stake, to participate in the dispute settlement process as litigation consultants to smaller co-claimants that have a right to assert their claims. GATT cannot afford to allow the courting of major trade players in dispute settlement to serve as a decisive factor in dispute resolution. Equally important, larger and more influential countries cannot be allowed to exert pressure on smaller countries demanding they seek uncompromising relief that will not only satisfy the smaller countries' legal and economic interests, but also those of the larger country. In response to these objectionable tendencies, Article 10 of the DSU allows third parties, irrespective of their influence, to participate in the dispute settlement process so long as they have a "substantial interest in [the] matter before a panel."²²⁷ By filtering parties whose rights were violated from parties who have only an interest in the outcome of a dispute, the DSB preserves the integrity of the system enabling panels to focus on addressing the issues that the proper disputants raise and more importantly on recommending equitable relief that restores the dislocated balance of concessions.

CONCLUSION

The *Banana Case* illustrates a direct violation of a GATT party's obligations toward other GATT members. The EC's promulgation of EEC 404/93, which created the banana import regime, and the establishment of the Framework Agreement on Bananas undeniably impaired the benefits that the Latin American third countries rightfully anticipated to accrue from the GATT. The United States, under a hybrid of both the American and the ICJ doctrines of standing, would not prevail as a claimant in the subject dispute. Although established international

226. The importance of the application of a standing doctrine rises when considering the possible strain on settlement prospects that the U.S. involvement harbors in the *Banana Case*. Similar to the BFA countries' acquiescence to the EC's proposal for country-specific quota allocations, the current Latin American claimants of Ecuador, Honduras, Guatemala, and Mexico could foreseeably desire to settle short of the demands the U.S. interests dictate. See *supra* Part IV.B.5.

227. See DSU, *supra* note 14, art. 10, at 413.

and national *locus standi* principles do not directly govern the operations of GATT dispute settlement, the mechanisms that such adjudicatory entities use to determine a party's proper stake in the dispute are appropriate for and amenable to the DSB's functions.

Such a doctrine would allow the DSB to fulfill its primary objective of crafting relief that would restore the balance of concessions that the alleged injury altered. Additionally, the proper claimants to the dispute may better serve their own interests by asserting their positions without the undue influence of an improper claimant. Nonetheless, denying the United States legal standing would not impede its right to voice its position through a third party intervention. The twin objectives of a GATT standing doctrine are necessary to the effective and fair administration of dispute settlement in a multilateral international forum that has assumed an adjudicatory complexion. To avoid compromising the achievement of such objectives, the WTO should make the formulation of a standing doctrine a priority. The inclusion of the United States as an improper party in the *Banana Case* gives rise to speculations as to the role it has played in such resolution, and inevitably will create an aura of distrust in an already inherently distrustful environment.

